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Supreme Court of the United States

LAZAR S. FINKER, RAISSA M. FRENKEL,
STEVEN CHARLES KOEGLER, WILLIAM E. CHATTIN,
THEODOROS J. KAVALIEROS, and
AFRODITI KAVALIEROS,

Petitioners,

v.

GALINA WEBER,

Respondent.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Eleventh Circuit affirmed the district court's order affording Galina Weber, a criminal defendant in a Swiss criminal proceeding, production of documents in the United States under 28 U.S.C. §1782(a) pursuant to the Federal Rules of Civil Procedure.

28 U.S.C. §1782(a) authorizes the federal district courts to grant discovery to "any interested person" for use "in a proceeding in foreign or international tribunal, including criminal investigations before formal accusation." Lacking, however, are substantive standards to be used for determining the scope of any discovery for criminal matters. The US-Swiss MLAT, 27 U.S.T. 20119 (1977), a self-executing Treaty, requires compulsory document production for assistance of criminal investigations and proceedings "shall . . . [employ] . . . only such compulsory measures as are provided in that state for investigations or proceedings in respect of offense committed within its jurisdiction." Art. 4(1).

Two questions are presented:

1. Whether the policy of the US-Swiss MLAT which dictates that the Federal Rules of Criminal Procedure to control discovery of documents in the United States for use in Switzerland, applies to compulsory document production requests by a Swiss criminal defendant invoking 28 U.S.C. §1782(a).

2. Whether the US-Swiss MLAT is inconsistent with 28 U.S.C. §1782 in that it requires application of the Federal Rules of Criminal Procedure, therefore making it controlling over 28 U.S.C. §1782(a).

PARTIES TO THE PROCEEDING

The only parties to this proceeding are identified in the caption. Petitioners are Lazar S. Finker, Raissa M. Frenkel, Steven Charles Koegler, William E. Chattin, Theodoros J. Kavalieros and Afroditi Kavalieros. Respondent is Galina Weber.

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PETITION FOR WRIT OF CERTIORARI

Petitioners, Lazar S. Finker, Raissa M. Frenkel, Steven Charles Koegler, William E. Chattin, Theodoros Kavalieros and Afroditi Kavalieros (“Jacksonville non-party shareholders”), respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. 1) is reported at 554 F.3d 1379. The November 30, 2007 order of the district court (App. 40) is reported at 2007 WL 4285362. The May 20, 2008 order of the district court (App. 13) is reported at 2007 WL 2157034, adopting the report and recommendation of April 15, 2008 (App. 16), which is reported at 2008 WL 1771822.

STATEMENT OF JURISDICTION

The court of appeals entered its decision on January 15, 2009. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTE AND TREATY INVOLVED

28 U.S.C. §1782(a) is printed in the appendix to this petition. App. 60.

US-Swiss MLAT is printed in the appendix to this petition. App. 63.



INTRODUCTION AND SUMMARY

The question presented in this case concerns the proper interpretation of 28 U.S.C. §1782(a) and the US-Swiss MLAT ("Treaty"). At issue is whether the federal statute or the international treaty is applicable for use in criminal investigations or proceedings. Section 1782(a) authorizes a federal district court to grant discovery to "any interested person . . . in a foreign or internal tribunal, including criminal investigations conducted before formal accusation." The Treaty requires discovery assistance to be conducted pursuant to the Federal Rules of Criminal Procedure in this case.

In the decision below, the Eleventh Circuit held that §1782(a) entitles petitioner Galina Weber, a criminal defendant in a Swiss *criminal* case seeking compelled production of documents for use in a Swiss criminal proceeding pursuant to §1782(a), to discovery determined by the Federal Rules of *Civil* Procedure. The court ruled that §1782(a) and the Treaty are consistent with each other because while §1782(a) applies to "any interested person" which includes

private criminal defendants, the Treaty applies only to discovery assistance for federal and state prosecutors and is silent as to “non-States [sic] Parties criminal defendants.” App. 6-8. Alternatively, if inconsistent, the court concluded the last statute or treaty in date controls over the other. Because the court determined the 1996 amendment expanded the statute “to facilitate discovery by individuals for use in criminal actions,” and it was enacted after the Treaty, §1782(c) controls and Ms. Weber is entitled to civil discovery rather than the more restrictive discovery process permitted by Federal Rules of Criminal Procedure, Rule 17(c). App. 9. Finally, the Eleventh Circuit concluded that the lower courts were correct because “§1782(a) directs judges to provide discovery assistance pursuant to the Federal Rules of Civil Procedure.” App. 10.

The building blocks of the decision conflict with determinations of this Court in *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004), and this Court should exercise its supervisory power. Because the Eleventh Circuit opinion approves district courts applying liberal civil discovery to a Swiss criminal defendant for use in a Swiss criminal proceeding even though Switzerland and the United States have jointly committed public policy that requires use of the criminal law and rules for compelling discovery as set out in their bilateral Treaty, the appellate court has put the issue directly in issue. Moreover, this decision is inconsistent with the policy of the United States that limits a criminal

defendant's right to commence a civil action to obtain discovery in excess of that permitted by the Federal Rules of Criminal Procedure. It is firmly established that the law and rules governing compelled criminal discovery are more restrictive than that existing in civil actions.

The Eleventh Circuit has decided an important question of federal law raised in this petition that should be reviewed by this Court. In ruling upon the important federal question, the appellate court came to its decision in a way that conflicts with carefully considered determinations by this Court in *Intel*.

These issues are ripe and prescient with this case. The bilateral, self-enforcing Treaty between the United States and Switzerland codifies the policy of both sovereigns. When compulsory process is to be employed for use in criminal investigations and proceedings, the criminal rules of procedure of the country wherein the request is made apply. While this Court in *Intel* concluded the textual language of §1782(a) to be merely a "mode-of-proof-taking instruction," the Eleventh Circuit held the same language "directs judges to provide discovery assistance pursuant to the Federal Rules of Civil Procedure." *Intel*, 542 U.S. at 260, n.11; App. 10. Moreover, the Eleventh Circuit's view of a "last in date" rule with respect to whether or not a statute or treaty is controlling is untenable. This Court declared in *Intel* that the 1996 enactment to §1782(a) was to "clarify that the statute [in 1964 enactment form] 'covers

criminal investigations conducted before formal accusation.'" 542 U.S. at 259. Since the 1996 legislative action only clarified the 1964 amendment of §1782(a), the Treaty enacted in 1977 was last in time. The Eleventh Circuit disagreed. App. 9. The Treaty controls and thus requires the use of the criminal rules of procedure in making a determination of compulsory discovery and its scope.

STATEMENT OF THE CASE

1. The foreign criminal investigation and proceeding on which Galina Weber has predicated her continuing request for §1782(a) discovery for use in that Swiss proceeding is an investigation by a Swiss investigating magistrate of a complaint filed by GASITERA Suisse A.G. App. 160. The felony charges against Galina Weber and her codefendants, Urs and Silvio Weber who were fiduciaries of GASITERA, are fraud, embezzlement and misappropriation in connection with the theft of property known as Berg Waldegg (Castle Waldegg). The alleged criminal activity was accomplished, in part, by the fiduciary defendants creating a bearer mortgage note on Castle Waldegg in the amount of \$4,800,000(US) and then transferring it to defendant Galina Weber on June 8, 2006. A short time later the actions were discovered, the fiduciaries discharged and the criminal complaint filed in August 2006. App. 160.

2. Ms. Weber asserts a defense to the charges that Itera Group, a holding company, of which GASITERA is a subsidiary, owed her a dividend of \$4,800,000. Under Swiss law, offsetting a debt is a complete defense.

According to Ms. Weber, an Itera Group shareholder, she owns 14.5% of the outstanding Itera Group shares in two groups and two capacities. In one group of shares representing 2.5% of the outstanding shares, she has a legal and beneficial interest. For the other group of shares, the remaining 12%, she has legal title but holds the shares only for the benefit of an undisclosed owner. She further contends the Itera Group Board approved the payment of a dividend on May 28, 2005, and she received an amount equal to her 2.5% ownership from Ample Time Enterprise, Ltd., a company not shown to be affiliated with Itera Group. The unpaid dividend on the remaining 12% interest would have been equal to \$4,800,000.

In her statement of August 7, 2006, to the Swiss investigating magistrate, Ms. Weber represented that her husband possessed the documents completely supporting the defense that the dividend was ordered and paid. When the Swiss investigating magistrate requested production of the documents, Urs Weber refused disclosure claiming "tactical reasons in connection with the case," and pronounced that he and his wife [petitioner] "had waited a long time to disclose 'the big unpublished matter.' They were looking forward to a trial in Switzerland to do so . . . " and

bragged the disclosure would cause “big waves.” If they produced the claimed documents supporting their defense to the Swiss magistrate, the proceeding would be dropped.¹ Neither Ms. Weber nor her co-defendants have requested discovery in the Swiss criminal proceeding while entitled to do so under the Swiss penal code and code of criminal procedure for use in their criminal proceedings.

3. On April 27, 2007, Ms. Weber instituted this action for discovery under §1782(a), which was subsequently amended on October 4, 2007. App. 120. Attached to the Petition was far-reaching and a wide ranging Request for Production² made pursuant to the Federal Rules of Civil Procedure. The Jacksonville non-party shareholders objected to the availability and scope of production of documents sought by Ms. Weber for use in the Swiss criminal case. They urged that because the request was for use in a criminal proceeding and the Treaty existed between the United States and Switzerland, the determination

¹ The Jacksonville non-party shareholders contend this §1782(a) action is pretextual and brought for reasons unconnected to Ms. Weber’s defense of the Swiss criminal case. Discovery below is continuing.

² Although the two foreign proceedings do not have overlapping claims or defenses, Ms. Weber’s Amended Petition sought discovery not only for the Swiss criminal case but for use in a separate civil action she had previously commenced in the country of Cyprus. App. 120. Her Cyprus civil complaint, however, does not make a claim for the dividend and therefore does not overlap with the Swiss criminal case. App. 141, Ex. A, par. 6, pp. 2-3.

and scope of production should be prescribed under the law of Federal Rule of Criminal Procedure 17(c). Since Ms. Weber did not attempt to meet the Rule 17(c) requirements imposed by *United States v. Nixon*, 418 U.S. 683, 699-700 (1974), and its progeny, she was not entitled to production for use in the Swiss criminal case. While finding the argument logical, the magistrate judge could not find supporting case law and rejected the argument. He concluded §1782(a) required the determination and scope of production to be made in accordance with the Federal Rules of Civil Procedure, Rules 26 and 34. App. 54.

In affirming the magistrate judge's report and recommendation (App. 40), the district court concluded Ms. Weber was entitled to discovery production for use in the Swiss criminal case under the Federal Rules of Civil Procedure.

4. In ruling upon Ms. Weber's motion to compel discovery, the magistrate judge narrowed the wide ranging document request but did so pursuant to the Federal Rules of Civil Procedure. App. 16. The district court affirmed. App. 13. If Federal Rule of Criminal Procedure 17(c) had been applied, most certainly production for use in the Swiss criminal case would have been denied.

5. The court of appeals affirmed. It held that in a §1782(a) request, determination and scope of production of documents from non parties to the Swiss criminal case by the Federal Rules of Civil Procedure is appropriate despite the Treaty. In the court's view,

the Treaty is not inconsistent with §1782(a) because the Treaty applies to federal and state prosecutors and "is silent on its applicability to discovery requests by non-States [sic] Parties criminal defendants," while §1782(a) is for "all interested persons." App. 8. Alternatively, the appeals court reasoned that if §1782(a) and the Treaty are inconsistent, then §1782(a) was enacted last in date, and therefore §1782(a) requires application of the Federal Rules of Civil Procedure. App. 8. The appeals court, quoting from two sentences in the statute's text, directs district court judges "to provide discovery assistance pursuant to the Federal Rules of Civil Procedure." App. 10.

REASONS FOR GRANTING THE PETITION

The important question in this petition is whether the bilateral US-Swiss commitment to employ the Federal Rules of Criminal Procedure in compelling discovery production for use in a Swiss criminal investigation or proceeding controls §1782(a) requests for compelled discovery for use in a criminal investigation proceeding. Directly implicated in this question is the relationship between the United States and Switzerland, the ability of prosecuting authorities in each country to obtain compelled discovery for use in criminal investigations and proceedings notwithstanding the fact that the authorities are "any interested person" under §1782(a), and the district court's standard for determining and deciding the

scope of discovery by criminal defendants for use in criminal proceedings.

This Court's supervision is warranted and urgently needed. The Eleventh Circuit's decision disregards several important determinations made by this Court in *Intel* and undermines an integral, deeply embedded policy in our American jurisprudence. Specifically, compelled discovery for use in criminal investigations and proceedings is determined and its scope defined by the Federal Rules of Criminal Procedure. Compelled criminal discovery is more restrictive than that permitted by liberal civil discovery and criminal defendants are not permitted to circumvent the restrictions of the Federal Rules of Criminal Procedure by commencing a civil action and pursuing the far more expansive discovery available under the Federal Rules of Civil Procedure.

REVIEW IS WARRANTED BECAUSE THE ELEVENTH CIRCUIT'S DECISION IS A DEPARTURE FROM THIS COURT'S PRECEDENT, CORE PRINCIPLES OF CRIMINAL LAW AND REQUIRES THE EXERCISE OF THIS COURT'S SUPERVISORY POWERS

The Eleventh Circuit opinion is in conflict with *Intel* in ways that compel this Court's exercise of supervisory power. This Court has expressed receptiveness to the use of its supervisory power for an appropriate rule in §1782(a) proceedings. *Intel*, 542 U.S. at 265.

It is undeniable that the Treaty requires compulsory discovery for use in criminal investigations and proceedings to be determined by the requested state's criminal law and rules of criminal procedure. Enacted as a bilateral Treaty on criminal matters, it represents the specific law and procedure to be used for determining compelled discovery for use in criminal investigations and proceedings between the United States and Switzerland. Both countries agreed to employ the criminal law and rules of the requested state. Treaty, Art. 9(1). In adopting this standard, the Treaty reflects American jurisprudential experience: discovery for use in a criminal case must be based upon criminal law and its rules and not broad civil discovery.

At its core, this case presents the interplay of the Treaty and §1782(a). Both are enacted laws of this country and Switzerland and are of equal parity. The lower court's refusal to require the determination and scope of discovery for use in criminal cases undermines our well-established principles and practice for criminal discovery.

The Eleventh Circuit permitted this departure by failing to follow important determinations made in *Intel*. This Court concludes the 1964 revision of §1782(a) reflects "Congress' recognition that judicial assistance would be available whether the foreign or international proceeding *or investigation* is of a criminal, civil, administrative, or other nature." [citations omitted.] *Intel*, 542 U.S. at 259. Without

explanation, the Eleventh Circuit rejected this straightforward determination and conclusion that the 1996 amendment was a clarification of the 1964 enactment. Instead, the lower court erroneously and contrary to this Court's pronouncement concluded Congress intended "to facilitate discovery by individuals for use in foreign criminal action" by amending §1782(a) with "including criminal investigations conducted before formal accusation." App. 9. Clarifications are not subsequent enactments. The 1996 language revision to §1782(a) adds nothing new or takes anything away from the statute. The 1996 amendment operates only to affirm the original intent of the statute. *See, e.g., United States v. Svete*, 556 F.3d 1157, 1170 (11th Cir. 2009) (Edmondson, C.J., concurring). This means that the 1964 enactment has been in effect continuously and the later amendment to the statute does not affect the Treaty provisions for determining substantive discovery. The Treaty's directives for determining compelled discovery should have been ordered.

Section 1782(a) is a general statute which provides judicial assistance to foreign tribunals for use by "any interested person" that necessarily includes "States [sic] Parties."³ Enacted concurrently with the

³ Professor Hans Smit's authoritative commentary states that the term "any interested person" is "intended to include not only litigants before foreign or international tribunals, but also foreign and international officials as well as any other person whether he be designated by foreign law or international convention or merely possess a reasonable interest in obtaining

(Continued on following page)

1964 revision of §1782(a), the phrase "any interested person" in ordinary common language is inclusive and encompasses, at the least, all persons entitled to participate in a criminal investigation or proceeding, and a person designated or under a foreign law or treaty. Enacted subsequently in 1977, the Treaty specifically applies to assistance in criminal *investigations* and proceedings between the Central Authorities of the United States and Switzerland and requires the application of the criminal law and rules of criminal procedure of the requested state (in this case the United States). The Treaty has always applied to criminal investigations as has §1782(a) since the 1964 enactments. The Treaty is the last enactment. Although explicitly applying to a subset of "all interested person[s]" of §1782(a) exclusively to criminal investigations and court proceedings, the Treaty has always represented the declared policy of the United States and Switzerland, and has always applied to compelled assistance for criminal investigations and proceedings.

Taking the Eleventh Circuit decision to its logical conclusion, the Treaty will apply and supersede §1782(a) only when federal and state prosecutors of the Central Authorities of the United States and Switzerland seek discovery assistance from one another even though they are "interested person[s]"

the assistance." Hans Smit, *International Litigation Under the United States Code*, 65 Colum. L. Rev. 1015, 1027 (1965).

under §1782(a). This will result in limited reciprocal assistance by criminal law and procedure of the requested state. On the other hand, a criminal defendant who is also a member of "any interested person" will be able to compel discovery pursuant to the expansive and liberal standards of the requested country's rules of civil procedure. This extraordinary asymmetrical result does not exist otherwise within the American criminal system, and should not be permitted when §1782(a) applies to compelled criminal discovery.

Section 1782(a)'s language simply does not require the use of the Federal Rules of Civil Procedure. The Eleventh Circuit's textual reference to the statute supporting its decision to uphold the determination and scope of production based upon the Federal Rules of Civil Procedure is misplaced. The two sentences of §1782(a) cited by the lower appeals court are that "[t]he order may prescribe the practice and procedure of the foreign country . . . [t]o the extent that the order does not prescribe otherwise . . . the document [shall be] produced, *in accordance* with the Federal Rules of Civil Procedure," 28 U.S.C. §1782(a) (emphasis in Eleventh Circuit's court opinion). This Court previously rejected this construction of the statute. *Intel*, 542 U.S. at 260 n.11 ("This mode of proof-taking instruction imposes no substantive limitation on the discovery to be had.") As previously resolved by this Court, the quoted section plainly does not define the source of rules for determining of allowable discovery and its scope, but only the "practice and

procedure" for taking whatever evidence is deemed to be discoverable. The quoted sections were added in 1964 to cure a problem with §1782(a)'s predecessor, which required that depositions be taken in accordance with American civil rules. These provisions were added simply to ensure that district courts have authority to proscribe procedures – deposition-taking procedures in particular – as needed to facilitate particular foreign requests. See Smit, *International Litigation*, *supra* at 1028. They have nothing to do with the substantive rules for determining discovery and its scope. The Eleventh Circuit has ignored this Court's determination on this point and wrongly concluded §1782(a) provides district courts only with discretion to control discovery by the "practice and procedure of the foreign country" or the Federal Rules of Civil Procedure. The Eleventh Circuit's support for this conclusion consists of circuit and district court cases decided pre-*Intel*. App. 10. See, e.g., *Kestral Coal PTY, Ltd. v. Joy Global, Inc.*, 362 F.3d 401, 404 (7th Cir. 2004) (holding that discovery "must conform either to the procedure of the foreign nation or that of the Federal Rules of Civil Procedure"); *Application of Sumar*, 123 F.R.D. 467, 469-70 (S.D.N.Y. 1988) (declining to apply the Federal Rules of Civil Procedure where the foreign proceeding was criminal in nature because §1782(a) provides "[t]o the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure.") This further confirms the appropriateness of invoking this Court's supervision.

In review, §1782(a) does not address the standard to be used for determining compelled discovery. In this case, the Treaty controls. Section 1782(a) authorizes a federal district court to provide judicial assistance to "States [sic] Parties" as does the Treaty. Because the Treaty is the joint determination and enactment of the United States and Switzerland for the specific and express purpose of providing mutual assistance in criminal investigations and proceedings, its provisions regarding compelled discovery must be followed by the district court in the context of §1782(a). If prosecutors or "States [sic] Parties" are seeking production of documents under §1782(a), the Treaty necessarily requires the application of the Federal Rules of Criminal Procedure. To do otherwise, the district court would render the Treaty without effect. Where a Swiss criminal defendant seeks compelled production from a third party under §1782(a), the district court must defer to the law and procedure set out in the Treaty and order production based upon the application of Federal Rules of Criminal Procedure 17(a). The choices by the sovereigns set out in the Treaty are controlling and the district court lacks discretion to ignore the Treaty's provisions.

Swiss criminal defendant Weber is not entitled to the benefits of a civil discovery standard that avoids the Treaty's specific direction the requested country's criminal law and procedure are to apply. This consciously and carefully drafted and enacted agreement regarding the application of criminal law and rules is consonant with the American and Swiss experience in

their judicial systems. Criminal matters require their own separate law and rules. Good and sufficient reasons exist for these differences and the application of the criminal rules of procedure is critical to the administration of criminal justice.

Not only does the Treaty impose the more limited compelled discovery required by the Federal Rules of Criminal Procedure, but federal district courts impose identical restrictions upon criminal defendants before them in criminal matters. American courts restrict and prevent criminal defendants from commencing a civil action in order to obtain discovery by the Federal Rules of Civil Procedure for use in the criminal case. *See, e.g., United States v. Tison*, 780 F.2d 1569, 1572 (11th Cir. 1986) ("A litigant should not be allowed to make use of the liberal discovery procedures available to a civil suit as a dodge to avoid the restrictions on criminal discovery . . .") (quoting *Campbell v. Eastland*, 307 F.2d 478, 487 (5th Cir. 1962)). By invoking the Federal Rules of Civil Procedure for expansive discovery in bringing this action under §1782(a), Ms. Weber has successfully and continually undertaken civil discovery that would not be permitted under Federal Rule of Criminal Procedure 17(c).

The lower courts should be required to apply the same law and rules to criminal defendants whether they appear before them in a criminal case or as one seeking compelled discovery under §1782(a). Since the lower courts have sanctioned such departures

from criminal procedures, this Court should exercise its supervisory power.

CONCLUSION

This petition for writ of certiorari should be granted.

Respectfully submitted,

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April 15, 2009

App. 1

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 08-13372

D. C. Docket No. 07-00027-CV-J-32MCR

GALINA WEBER,
In the Matter of Her Application,

Petitioner-Appellee,

versus

LAZAR FINKER,
RAISSA M. FRENKEL,
STEVEN CHARLES KOEGLER,
WILLIAM E. CHATTIN,
THEODORUS J. KAVALIEROS,
AFRODITI KAVALIEROS,

individuals; respondent discovery sought from,

Respondents-Appellants,

IGOR V. MAKAROV,
an individual; respondent discovery sought from,

Respondent.

Appeal from the United States District Court
for the Middle District of Florida

(Filed January 15, 2009)

App. 2

Before WILSON and COX, Circuit Judges, and ALBRITTON,* District Judge.

WILSON, Circuit Judge:

This case involves the authority of the federal district courts to assist litigants before foreign tribunals with the production of evidence in the United States. The Appellants are shareholders in Itera Group, Ltd., a Cypriot corporation, who all reside in Jacksonville, Florida ("Florida shareholders"). The Florida shareholders appeal the Magistrate Judge's April 15, 2008 Order granting in part and denying in part Galina Weber's Motion to Compel Discovery, and the district court's May 20, 2008 affirmance of that Order. Weber's Motion to Compel Discovery was filed pursuant to 28 U.S.C. § 1742(a), which provides discovery assistance for litigants before foreign tribunals. After review and oral argument, we affirm.

I. BACKGROUND

Weber is a citizen of Switzerland and a resident of Monaco. Like the Florida shareholders, she is a shareholder of Itera Group. Itera Group is a large company with many subsidiaries throughout the world, with oil and natural gas concerns in Russia and real estate holdings. Weber's husband, Urs

* Honorable William H. Albritton, III, United States District Judge for the Middle District of Alabama, sitting by designation.

Weber, was legal counsel to an Itera subsidiary, and her brother-in-law, Silvio Weber, was a director of an Itera subsidiary.

A. Foreign Legal Actions

Weber is involved with two separate foreign legal actions. Both involve business transactions with Itera Group. Weber is the plaintiff in a Cypriot civil action. She is also the defendant in a Swiss criminal action, which Itera instituted against her, alleging that she received property embezzled from the company.

Weber filed a civil lawsuit in Cyprus against Itera Group, the CEO of Itera Group, Igor V. Makarov, and Sweet Water Intervest Corporation, which is a British Virgin Islands corporation that Weber alleges is controlled by Makarov. Weber claims that Makarov offered to buy her 14% ownership interest in Itera Group, but then backed out when he believed he could get her shares for less money. She alleges that Makarov had Itera Group's Board of Directors authorize the issuance of six million shares to dilute her ownership interest from 14% to 4%. She further alleges that she was denied the right of first refusal and that other shareholders received funds to purchase the additional shares from Makarov, through Itera Group or an affiliated company.

After Weber instituted the Cypriot action, Gas Itera, an Itera Group subsidiary, filed criminal charges against Weber in Switzerland, alleging that Weber embezzled Itera Group assets. Specifically,

App. 4

Itera alleges that Weber, through collusion with her husband and brother-in-law, embezzled a Swiss castle worth \$4.8 million from Itera Group. Weber's defense is that Itera Group owed her \$4.8 million in unpaid dividends. Under Swiss law, offsetting a debt in such a situation is a complete defense to embezzlement.

Weber alleges that, in January 2005, the Itera Group Board of Directors approved a shareholder dividend of \$80 million, to be dispersed in two payments ("tranches") of \$40 million. In March 2004, Itera paid the first dividend, and all shareholders, including Weber, received their proportionate share. Weber alleges that the Itera Group Board approved the second payment at its May 28, 2005 meeting, but that she did not receive her proportionate share. Weber alleges she received an amount equal to 2.5% ownership interest rather than the 14.5% ownership interest she had in the corporation. The unpaid 12% would have been equal to \$4.8 million. Weber further alleges that the Florida shareholders received full payment of their proportionate shares.

B. Petition for Discovery in Aid of Foreign Proceedings

On April 27, 2007, Weber filed a Petition for Discovery in Aid of Foreign Proceedings, pursuant to 28 U.S.C. § 1782(a), which she later amended. Weber's Amended Petition seeks discovery of documents related to both the Cypriot and Swiss actions. On October 11, 2007, the Magistrate Judge issued a

Report and Recommendation concluding that Weber was entitled to discovery governed by the Federal Rules of Civil Procedure. The United States District Court for the Middle District of Florida adopted the Magistrate Judge's Report and Recommendation and granted Weber's Amended Petition for Discovery in Aid of Foreign Proceedings. The district court authorized the Magistrate Judge to consider Weber's Motion to Compel and enter an Order with the final decision on the scope of permissible discovery, which would be subject to review only if clearly erroneous or contrary to law.

On May 20, 2008, the district court ordered that the Florida shareholders produce responsive documents by June 5, 2008. The Florida shareholders filed a Motion to Stay. The district court entered its Order and granted a temporary stay pending appeal on the Motion to Stay to this Court. On August 4, 2008, we denied the Florida shareholder's Motion to Stay. The district court directed that the Florida shareholders had until August 12th to produce responsive documents. The Florida shareholders appealed.

II. STANDARD OF REVIEW

We review a district court's grant of judicial assistance to a foreign country for abuse of discretion. *In re: Clerici*, 481 F.3d 1324, 1331 (11th Cir. 2007). "[T]his deferential standard is identical to that used in reviewing the district court's ordinary discovery

rulings.” *Id.* (internal quotation marks and citation omitted).

We review a district court’s interpretation of law *de novo*. *Id.* “Thus, this Court reviews *de novo* the district court’s interpretation of a treaty or a federal statute such as § 1782.” *Id.*

III. DISCUSSION

A. The Relationship Between 28 U.S.C. § 1782 and the U.S.-Switzerland MLAT

The Florida shareholders argue that Weber should have brought her request for judicial assistance under The Treaty Between the United States of America and the Swiss Confederation on Mutual Assistance in Criminal Matters, (“U.S.-Switzerland MLAT”) rather than under 28 U.S.C. § 1782. We disagree.

“As ‘in all statutory construction cases, we begin with the language of the statute.’” *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 255, 124 S. Ct. 2466, 2477 (2004) (quoting *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450, 122 S. Ct. 941, 950 (2002)) (alternations omitted). 28 U.S.C. § 1782(a) specifically provides that “[t]he district court of the district in which a person resides or is found may order him . . . to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation.” Section 1782(a) further

provides that “[t]he order may be made . . . upon the application of *any interested person*. . . .” 28 U.S.C. § 1782(a) (emphasis added). *See also Intel Corp.*, 542 U.S. at 256-58, 124 S. Ct. at 2478-79 (holding that private parties may seek discovery for use in a foreign proceeding through § 1782).

In contrast, the U.S.-Switzerland MLAT provides that “[t]he *Contracting Parties* undertake to afford each other . . . mutual assistance in: [a] investigations or court proceedings in respect of offenses the punishment of which falls or would fall within the jurisdiction of the judicial authorities of the requesting State or a state or canton thereof. . . .” Treaty Between the United States of America and the Swiss Confederation on Mutual Assistance in Criminal Matters, U.S.-Switz., art. 1, Dec. 23, 1975, 27 U.S.T. 2019 (hereinafter “U.S.-Switz. MLAT”) (emphasis added).

28 U.S.C. § 1782(a) and the U.S.-Switzerland MLAT are consistent with one another. Whereas § 1782 specifically provides that “any interested person” may apply to a United States district court for foreign discovery assistance, the U.S.-Switzerland MLAT is a treaty between States Parties. 28 U.S.C. § 1782(a). All of the language in the treaty speaks to facilitating discovery for the “Contracting Parties” or “Contracting States,” namely, the United States and Switzerland. A plain reading of the U.S.-Switzerland MLAT indicates that it is designed to help federal and state prosecutors. The treaty is silent on its applicability to discovery requests by non-States

Parties criminal defendants.¹ See, e.g., *In re: Request from the Swiss Fed. Dep't of Justice & Police*, 731 F. Supp. 490, 491 (S.D. Fla. 1990) (holding, in a case where the Swiss government sought assistance in a criminal prosecution, that the MLAT and § 1782 should be read as consistent with one another).

Moreover, even if § 1782 and the U.S.-Switzerland MLAT were inconsistent, § 1782 would still be the appropriate vehicle for Weber's discovery request under the last in time rule. "When [a treaty and statute] relate to the same subject, the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either; but if the two are inconsistent, the one last in date will control the other. . . ." *Whitney v. Robertson*, 124 U.S. 190, 194, 8 S. Ct. 456, 458 (1888). See also *Valencia v. United States AG*, No. 05-15748, 2006 U.S. App. LEXIS 9999, *13 (11th Cir. Apr. 20 2006) (per curiam); *Guevara v. United States AG*, No. 04-13712, 2005 U.S. App. LEXIS 9552, *15 (11th Cir. May 24, 2005) (per curiam). The U.S.-Switzerland MLAT went into force on January 23, 1977. Although § 1782 was enacted in 1948, it was amended in 1996, rendering it "last in date." Regardless of the fact that the U.S.-Switzerland MLAT provides that "[t]he provisions of this Treaty shall take precedence over

¹ We decline to hold that no private party could ever seek redress, facilitated by their State Party, pursuant to the MLAT. However, a plain reading of the treaty indicates that the MLAT is designed to facilitate discovery between States Parties.

any inconsistent provisions of the municipal laws in the Contracting States,” § 1782 controls. U.S.-Switz. MLAT, art. 38.

Furthermore, when Congress amended § 1782 in 1996, it did so by inserting “including criminal investigations conducted before formal accusation” after the words “for use in a proceeding in a foreign or international tribunal. . . .” Congress clearly intended for § 1782 to facilitate discovery by individuals for use in foreign criminal actions. Here, Weber sought judicial assistance prior to formal accusation by the Swiss government. Section 1782 is expressly applicable to her request.

B. The Federal Rules of Civil Procedure

The Magistrate Judge ordered that the Florida shareholders provide discovery pursuant to the Federal Rules of Civil Procedure. Section 1782 provides that “[t]he order may prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country . . . [t]o the extent that the order does not prescribe otherwise, . . . the document [shall be] produced, *in accordance with the Federal Rules of Civil Procedure.*” 28 U.S.C. § 1782(a) (emphasis added). *See also Kestrel Coal Pty. Ltd. v. Joy Global Inc.*, 362 F.3d 401, 404 (7th Cir. 2004) (holding that discovery “must conform either to the procedure of the foreign nation or to that of the Federal Rules of Civil Procedure”); *In re Edelman*, 295 F.3d 171, 178 (2d Cir. 2002) (applying the Federal

Rules of Civil Procedure to a § 1782(a) discovery request); *Bayer AG v. Betachem, Inc.*, 173 F.3d 188, 192 (3d Cir. 1999) (“[S]ection 1782 . . . incorporates by reference the scope of discovery permitted by the Federal Rules of Civil Procedure.”); *Application of Sumar*, 123 F.R.D. 467, 469-70 (S.D.N.Y. 1988) (declining to apply the Federal Rules of Criminal Procedure where the foreign proceeding was criminal in nature). Given that § 1782(a) directs judges to provide discovery assistance pursuant to the Federal Rules of Civil Procedure, the district court was well within its discretion to order discovery pursuant to the Federal Rules of Civil Procedure in this case.²

The Florida shareholders contend that we should limit discovery to documents “for use in a proceeding in a foreign or international tribunal.” 28 U.S.C. § 1782(a). They argue that the “for use in” language limits the scope of discovery available through § 1782(a) to documents that will actually be used in the foreign proceedings.

² The Florida shareholders contend that Weber will be able to discover a broader range of documents under the Federal Rules of Civil Procedure than she would be able to discover under the Federal Rules of Criminal Procedure. They argue that we should not allow Weber to receive more discovery for her Swiss criminal action than a United States prosecutor would be allowed to discover for use in a prosecution in the United States. This argument is without merit. The Supreme Court held in *Intel* that discovery under § 1782 is not limited to discovery that would be allowed under United States law “in domestic litigation analogous to the foreign proceeding.” See *Intel*, 542 U.S. at 263, 124 S. Ct. at 2483.

“Once discovery is authorized under § 1782, the federal discovery rules, *Fed. R. Civ. P. 26-36*, contain the relevant practices and procedures for the taking of testimony and the production of documents.” *In re Clerici*, 481 F.3d at 1336. Section 1782 does not require that every document discovered be actually used in the foreign proceeding. Quite the opposite. Section 1782 expressly provides that the district court should grant discovery under the Federal Rules of Civil Procedure. Pursuant to Rule 26(b)(1) of the Federal Rules of Civil Procedure, “[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense—including the existence, description, nature, custody, condition, and location of any documents. . . .” *FED. R. Civ. P. 26(b)(1)*. The Magistrate Judge did not err by granting discovery “for context,” when such discovery is allowed under Rule 26(b)(1).³

C. Order Granting In Part Weber’s Motion To Compel

Finally, the Florida shareholders contend that a Motion to Compel under § 1782 is a final, dispositive order because, although there is an ongoing action in

³ Although Weber simultaneously sought discovery for both her Cypriot and Swiss actions, the Magistrate Judge made careful rulings on the scope of discovery, separating out which discovery requests were appropriate for each action. The Magistrate Judge’s careful analysis was adopted by the district court. The district court did not abuse its discretion.

a foreign tribunal, the Motion to Compel is the final order to be issued by the United States court. They argue that the district court improperly determined the Motion to Compel to be a pretrial matter that could be referred to the Magistrate Judge.

The Florida shareholders did not object to the referral until after the Magistrate Judge entered his Order. "[A] party who objects to a reference to a magistrate must make his objections known either at the time of reference or soon thereafter." *Hill v. Duriron Co., Inc.*, 656 F.2d 1208, 1213 (6th Cir. 1981). "A party waives his objection when he participates in a proceeding before a magistrate and fails to make known his lack of consent or fails to object to any other procedural defect in the order referring the matter to the magistrate until after the magistrate has" ruled. *McLeod, Alexander, Powel & Apffel, P.C. v. Quarles*, 925 F.2d 853, 857 (5th Cir. 1991). The Florida shareholders waived this challenge to the referral by failing to timely object.

IV. CONCLUSION

Upon review of the record and the parties' briefs, and with the benefit of oral argument, we discern no error. Accordingly, we affirm the district court's May 20, 2008 Order.

AFFIRMED.

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION**

IN THE MATTER OF
THE APPLICATION OF
GALINA WEBER,

Petitioner,

vs.

Case No.

3:07-mc-27-J-32MCR

FOR DISCOVERY FROM
LAZAR S. FINKER, etc.,
et al.,

Respondents.

ORDER¹

(Filed May 20, 2008)

This case is before the Court on the Respondents' Objections to Magistrate Judge's Order Dated April 15, 2008 and Appeal to Federal District Court (Doc. 60), challenging the Magistrate Judge's April 15, 2008 Order (Doc. 59) granting in part and denying in part Petitioner's Motion to compel Discovery (Doc. 2). Petitioner filed a response in opposition (Doc. 64). Upon review, the Court holds that the United States

¹ Under the E-Government Act of 2002, this is a written opinion and therefore is available electronically. However, it has been entered only to decide the motion or matter addressed herein and is not intended for official publication or to serve as precedent.

Magistrate Judge had the authority to enter an Order, as opposed to a Report and Recommendation, on the motion to compel, filed pursuant to 28 U.S.C. §1782. Therefore, this Order will be set aside or modified only if “clearly erroneous or contrary to law,” pursuant to 28 U.S.C. § 636(b)(1)(A). See *In re Duizendstraal*, No. 3:95-mc-150-X, 1997 WL 195443, at *1 (N.D. Tex. Apr. 16, 1997) (explaining why procedural non-dispositive nature of discovery requests under 28 U.S.C. § 1782 confer authority on United States Magistrate Judges to enter Orders subject to review under clearly erroneous standard). The Court finds the Magistrate Judge’s April 15, 2008 Order grating in part and denying in part Petitioner’s Motion to Compel Discovery (Doc. 59) is not clearly erroneous or contrary to law and it is therefore **AF-FIRMED**. Respondents are **ORDERED** to produce the information as directed by the United States Magistrate Judge’s April 15, 2008 Order (Doc. 59) no later than **JUNE 5, 2008**. Because of this ruling, Respondents’ Motion for Stay Pending District Court Ruling on Objections and Appeal (Doc. 61) is **MOOT**. Respondents’ Motion for Oral Argument (Doc. 62) is **DENIED**.

DONE AND ORDERED at Jacksonville, Florida this 20th day of May, 2008.

/s/ Timothy J. Corrigan
TIMOTHY J. CORRIGAN
United States District Judge

App. 15

s.

Copies:

Hon. Monte C. Richardson
United States Magistrate Judge
counsel of record

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION**

IN THE MATTER OF
THE APPLICATION
OF GALINA WEBER,

Petitioner,

vs.

Case No. 3:07-
mc-27-J-32MCR

FOR DISCOVERY FROM
LAZAR S. FINKER, an
individual, RAISSA M.
FRENKEL, an individual,
STEVEN CHARLES
KOEGLER, an individual,
WILLIAM E. CHATTIN, an
individual, THEODOROS J.
KAVALIEROS, an individual,
AFRODITI KAVALIEROS,
an individual, and IGOR V.
MAKAROV, an individual,

Respondents. /

ORDER

(Filed Apr. 15, 2008)

THIS CAUSE is before the Court on Petitioner's Motion to Compel Discovery (Doc. 2) filed May 21, 2007. Respondents filed a response in opposition on

June 12, 2007.¹ (Doc. 12). On June 22, 2007, Petitioner filed a Reply (Doc. 17). Prior to ruling on the instant Motion to Compel, the Court first needed to determine whether to permit Plaintiff to obtain the requested discovery and grant Plaintiff's Petition for Discovery in Aid of Foreign Proceedings pursuant to 28 U.S.C. §1742(a). (Doc. 1). On October 11, 2007, the undersigned entered a Report and Recommendation to the District Judge recommending the Petition be granted. (Doc. 38). On November 30, 2007, Judge Corrigan adopted the Report and Recommendation (Doc. 43). The Court then directed the parties to file supplemental briefs regarding their positions on the Motion to Compel (Doc. 44). The parties did so (*see* Docs. 45 and 46) and accordingly, the Motion to Compel was ripe for judicial review. However, on December 31, 2007, Respondents filed a Notice of Appeal (Doc. 47). Thereafter, the undersigned asked the parties to file memoranda regarding their positions on whether the Court should stay its decision on the pending Motion to Compel. (Doc. 48). The parties pointed out that the Eleventh Circuit directed them to file briefs on the issue of whether the Order permitting discovery pursuant to 28 U.S.C. §1742(a) is a final appealable order. Accordingly, the undersigned elected to wait for the Eleventh Circuit to rule on that issue. On April 8, 2008, the Eleventh Circuit

¹ Actually, Respondents filed their original response on June 11, 2007 (Doc. 11) and then filed a Corrected and Amended Opposition to Motion to Compel (Doc. 12) on June 12, 2007.

determined the Order permitting discovery pursuant to 28 U.S.C. §1742(a) was not a final appealable order and dismissed Respondents' appeal. As such, the undersigned will now proceed to rule on the pending Motion to Compel.

I. BACKGROUND

As noted above, on April 27, 2007, Petitioner filed a Petition for Discovery in Aid of Foreign Proceedings pursuant to 28 U.S.C. §1742(a). (Doc. 1). Petitioner, Galina Weber, is a citizen of Switzerland and a resident of Monaco. She is a shareholder of Itera Group, Ltd., a Cypriot corporation. Itera Group is a large company with many subsidiaries throughout the world. The Respondents² are also shareholders of Itera Group and all reside in Jacksonville, Florida. Petitioner seeks discovery to assist her in two pending cases in foreign countries: a civil case in Cyprus and a criminal case against her in Switzerland.

A. The Cyprus case:

This civil lawsuit was filed by Petitioner against Itera Group, Igor Makarov ("Makarov") and Sweet Water Intervest Corporation (a British Virgin Islands corporation that Petitioner claims is associated with Makarov). The case claims that Makarov offered to

² During the October 3, 2007 hearing, counsel for Petitioner agreed to dismiss Igor Makarov, the CEO of Itera Group, without prejudice from the Petition.

buy 12% of Petitioner's 14.5% interest in Itera Group but failed to complete the transaction believing he could get her to sell the shares for less money. (Doc. 37, pp. 5-6). When Petitioner refused the subsequent offers, Itera Group's Board of Directors voted to increase the number of authorized shares in Itera Group by six million shares, thereby diluting Petitioner's entire ownership interest from 14.5% to 4.86%. (Doc. 37, p.7). Petitioner claims that the other shareholders were able to acquire additional shares because they received money from Itera Group or an affiliated company that Petitioner did not. (Doc. 37, p.7; Ex. A, p.3)

B. The Swiss case:

In the Fall of 2006, criminal charges were filed against Petitioner in Switzerland for allegedly embezzling Itera Group assets. The criminal charges were filed by Gas Itera, an Itera Group subsidiary, which claimed Petitioner, her husband and brother-in-law improperly obtained real property belonging to Itera Group by offsetting the purchase price against a nonexistent debt Itera Group allegedly owed Petitioner. (Doc. 10, pp. 6-7). Petitioner's defense is that Itera Group owed her \$4.8 million in unpaid dividends. Under Swiss law, offsetting a debt in such a situation is a complete defense to embezzlement.

Specifically, Petitioner claims that in January 2005, the Itera Group Board of Directors approved payment of dividends to its shareholders in the

amount of \$80 million to be dispersed in two tranches of \$40 million each. (Doc. 37, p.5). In March 2005, the first payment (or tranche) was made and all shareholders, including Petitioner, received a proportionate share of the dividend based on his/her ownership interest. *Id.* The distribution of the second tranche did not go as smoothly. According to Petitioner, the Itera Group Board of Directors approved the distribution of the second tranche at the May 28, 2005 meeting. (Doc. 37, p.6). However, Petitioner did not receive her full portion of the second tranche. She received an amount equal to 2.5% ownership in Itera Group rather than the 14.5% ownership she claims she had. *Id.* The unpaid 12% would have been equal to \$4.8 million. (Doc. 37, p.7). Petitioner claims the Florida Shareholders (the Respondents), on the other hand, received the full amount of their second tranche. She claims they devised a scheme to avoid taxes on the second tranche whereby Itera Group paid these shareholders their share of the second tranche through a shell company in the form of a loan, rather than as a dividend, which would be taxable. (Doc. 37, p.6).

On April 30, 2007, Petitioner served the Respondents with her discovery requests. Petitioner seeks numerous documents which she claims will assist her in both the Switzerland criminal case and the Cyprus civil action. Respondents object to the discovery on numerous grounds.

II. ANALYSIS

Motions to compel discovery under Rule 37(a) are committed to the sound discretion of the trial court. *See Commercial Union Ins. Co. v. Westrope*, 730 F.2d 729, 731 (11th Cir. 1984). The trial court's exercise of discretion regarding discovery orders will be sustained absent a finding of abuse of that discretion to the prejudice of a party. *See Westrope*, 730 F.2d at 731.

The overall purpose of discovery under the Federal Rules is to require the disclosure of all relevant information so that the ultimate resolution of disputed issues in any civil action may be based on a full and accurate understanding of the true facts, and therefore embody a fair and just result. *See United States v. Proctor & Gamble Co.*, 356 U.S. 677, 682, 78 S.Ct. 983 (1958). Discovery is intended to operate with minimal judicial supervision unless a dispute arises and one of the parties files a motion requiring judicial intervention. Furthermore, "[d]iscovery in this district should be practiced with a spirit of cooperation and civility." Middle District Discovery (2001) at 1.

In the instant motion, Petitioner served Respondents with eight individual discovery requests seeking various documents which she believes will assist her in both the Swiss and Cypriot actions. Respondents object that the requests and the definitions accompanying the requests are complicated, "over detailed," ambiguous, overbroad and burdensome.

(Doc. 45, p.9). The Court will examine each of the requests.

A. Request No. 1

This request seeks documents relating to any payment and/or financial transfers made to any of the Respondents by any other Respondent or Itera Group from January 1, 2003 to the present. (Doc. 2, p.3). Respondents object to this request on the grounds that it is overly broad, vague, ambiguous, burdensome and oppressive. (Doc. 45, Ex. B, p.7). Specifically, Respondents take the position that the request is so vague that complying with it would be “impossibly burdensome and oppressive.” *Id.* Additionally, Respondents point out that four of them are married to each other and requiring them to disclose information regarding payments or financial transactions between each other would be unduly intrusive and would not lead to admissible evidence. *Id.* Respondents also argue that because they have been employed by one or more Itera Group subsidiaries, they all have so many financial transactions with Itera Group (including wages, bonuses, expense reimbursements and employee benefits), responding to this request would be burdensome. *Id.* Finally, Respondents argue that the time period, January 1, 2003 to the present is too broad because the relevant time period for the Swiss action is May 2005 to March 2006 and for the Cypriot action is February 2006 to March 2006. (Doc. 45, p.6).

Petitioner responds that with respect to the Swiss action, this request only seeks documents "related to Respondents' receipt of any funds which may have constituted a portion of the Dividend." (Doc. 46, p.7). With respect to the Cypriot action, Petitioner claims that this request seeks evidence showing that "Respondents 'borrowed' funds from Itera Group or from Igor Makarov or some other third party and then immediately transferred the new shares back to Igor Makarov." *Id.*

Insofar as this request applies to the Swiss action, the Court believes it may lead to the discovery of admissible evidence. However, the request as drafted is overly broad. First, Petitioner herself claims that Respondents received the second tranche either from Itera Group or in the form of a loan from a third party. There has never been any allegation that one of the Respondents made a payment to another of the Respondents, with the possible exception of Mr. Makarov.³ Accordingly, the Court believes the request seeks irrelevant information insofar as it seeks documents regarding payments and financial transfers made to a Respondent from any other Respondent. Additionally, as Respondents point out, because many of them have at one time been employed by a subsidiary of Itera Group, providing all documents regarding any payment from January 1,

³ Now that Mr. Makarov is no longer a Respondent, the request as currently phrased would not cover him.

2003 to the present from Itera Group is overly broad. Petitioner claims she needs documents going back to January 1, 2003 to the present in order to "provide context to each irregular transaction" and "provide concrete evidence that the treatment of Petitioner has been different than the preferential treatment afforded to other shareholders (i.e. the Respondents)." (Doc. 46, pp. 9-10).

The Court believes requiring the Respondents to provide five years' worth of documents from Itera Group would be overly burdensome and would result in the production of much irrelevant information. Clearly, Petitioner seeks information regarding whether a second tranche payment was made to any of the Respondents. This payment was to have occurred in June 2005. The Court believes Petitioner may gain sufficient context by obtaining documents one year prior to the alleged tranche payment and one year after. Accordingly, the Court believes a reasonable time period for documents relating to payments, financial transfers, or other benefits conferred upon the Respondents from Itera Group or Mr. Makarov would be from June 1, 2004 to June 30, 2006.

With respect to the Cypriot action, Petitioner claims she needs the requested documents to show that "Respondents 'borrowed' funds from Itera Group or from Igor Makarov or some other third party and then immediately transferred the new shares back to Igor Makarov." (Doc. 46, p.7). Again, this request is overly broad insofar as it seeks documents relating to

payments from one Respondent to another Respondent. Additionally, the Court has a similar concern with respect to the time limit of five years. According to the Complaint in the Cypriot case, the actions at issue occurred between May 2005 and February 2006. (Doc. 37, Ex. A). The Court again believes Plaintiff may obtain sufficient context by obtaining documents from the year before and the year after the relevant time period. Therefore, for use in the Cypriot case, the relevant time period should be from May 1, 2004 to February 28, 2007. Accordingly, in response to Request No. 1, Respondents shall produce documents relating to payments, financial transfers, or other benefits conferred upon the Respondents from Itera Group or Mr. Makarov from May 1, 2004 to February 28, 2007.

B. Request No. 2

This request seeks documents relating to any communication between any of the Respondents and/or Itera Group relating to payments made to any Respondent from January 1, 2003 to the present. This request is very similar to Request No. 1 and indeed, during the hearing before the undersigned, counsel for Petitioner indicated that this request was simply a safety net for an attorney that wanted to read loopholes into Request No. 1. Respondents' objections are the same as with respect to Request No. 1 except that Respondents argue some communications may be protected by the spousal privilege or the attorney-client privilege. As Petitioner notes, Respondents

have failed to provide any support for the conclusory statement that responding to this request would lead to the production of privileged material. The party asserting a privilege has the burden to show that the privilege applies and that burden "can be met only by an evidentiary showing based on competent evidence, and cannot be 'discharged by mere conclusory or ipse dixit assertions.'" *CSX Transp. Inc. V. Admiral Ins. Co.*, 1995 WL 855421 *1 (M.D. Fla. 1995) (quoting *Bowne of New York City, Inc. v. AmBase Corp.*, 150 F.R.D. 465, 470 (S.D.N.Y. 1993)). Here, Respondents do not even refer to any specific documents they claim as being covered by either the spousal or attorney-client privilege. Instead, Respondents claim that there **may** be such documents. This is not sufficient and the Court will not prohibit discovery on such an unsubstantiated and speculative argument.

While the Court determined that with respect to Request No. 1, documents regarding payments and financial transfers between the Respondents was not relevant, the Court believes there may be relevant information regarding communications between the Respondents about payments and financial transfers to any of the Respondents from Itera Group or Makarov. Accordingly, the Court holds that Respondents shall produce documents relating to any communications between any of the Respondents and/or Itera Group and/or Makarov regarding payments, financial transfers, or other benefits conferred upon the Respondents from Itera Group or Mr. Makarov from May 1, 2004 to February 28, 2007.

C. Request No. 3

This request seeks documents relating to communications between any of the Respondents and Petitioner regarding payments, transfers of funds or other benefits conferred upon any of the Respondents from January 1, 2003 to the present. Besides their objections that the request is overly broad, vague, ambiguous, burdensome and oppressive, Respondents object to the definition of "Petitioner" contained within the Request for Production. With regard to Respondents' objections regarding the breadth of this request, the Court agrees the time period is too broad. Because the Court believes this request seeks documents that could lead to admissible evidence in either the Swiss or Cypriot case, the Court will permit Petitioner to obtain responsive documents from May 1, 2004 to February 28, 2007.

As to Respondents' burdensome/oppressive objection, the Court is not convinced responding to this request (with the new date parameters) will be overly burdensome. As Petitioner correctly points out, Respondents as the parties resisting discovery, bear the burden of establishing that responding to a discovery request will be unduly burdensome. *Border Collie Rescue, Inc. v. Ryan*, 2005 WL 662724 *2 (M.D. Fla. 2005) (quoting *Coker v. Duke & Co.*, 177 F.R.D. 682, 686 (M.D. Ala. 1998)). That burden cannot be met by a party simply claiming a response would be oppressive or expensive. Instead, the party claiming undue burden "must substantiate that position with detailed affidavits or other evidence[.]" *Id.* (quoting,

Coker, 177 F.R.D. at 686 and citing *Hammond v. Lowes Home Ctrs., Inc.*, 216 F.R.D. 666, 672 (D. Kan. 2003) ("The objecting party must show specifically how, despite the broad and liberal construction afforded the federal discovery rules, [the] question is overly broad, burdensome, or oppressive by submitting affidavits or offering evidence revealing the nature of the burden.")). In the instant case, Respondents have provided no evidentiary support for their claim that responding to this request would be overly burdensome and their conclusory statements are insufficient to persuade the Court to limit the request any more than it already has.

Finally, the Court will turn to Petitioners' objection regarding the definition of "Petitioner." In the Request for Production of Documents, "Petitioner" is defined as Petitioner as well as "all persons, principals, employees, managers officers or directors of corporations, partnerships or other associations acting as agents for or on behalf of the Petitioner and all agents, servants and employees." (Doc. 37, Ex. F, p.7). Respondents complain that they do not know who Petitioner's agents, servants or employees are. (Doc. 45, Ex. B). In response, Petitioner calls this argument a "red herring" because "[i]t is not credible that Respondents would not be able to discern among their personal documents which communications were sent to or received from Petitioner, her agents, servants, or employee which also relate to funds which passed through Respondents' own hands." (Doc. 46, p.8). The Court notes that Petitioner has not

shed any light on who or what may be her agents, servants or employees. Accordingly, to the extent the Respondents can tell whether a communication regarding payments, transfers of funds or other benefits conferred upon any of the Respondents from May 1, 2004 to February 28, 2007 is sent to or from Petitioner or one of Petitioner's agents, servants or employees, Respondents are directed to produce such.

D. Request No. 4

This request seeks every document relating to "the Dividend." "The Dividend" is defined as "the \$80 million dividend approved by the Itera Group Board of Directors, as alleged in the Petition, regardless of the manner in which the dividend was distributed and/or whether the entire approved dividend was ever fully distributed." (Doc. 37, Ex. F, p.10). Respondents object to this request as being overly broad, burdensome and oppressive. Specifically, Respondents point out that the Swiss case only deals with payment of the second tranche, whereas the definition of "Dividend" clearly covers both the first and second tranche. Petitioner responds that because she "cannot rule out that the Second Tranche may have been distributed to Respondents in conjunction with payment of the First Tranche," this request is reasonable. (Doc. 46, p.8). The Court need not address this argument because Respondents have already been directed to produce any documents regarding financial payments/transfers from either Itera Group or Makarov from May 1, 2004 to February 28, 2007.

Obviously, this would cover the alleged second tranche regardless of whether it occurred at the same time as the first tranche.

Respondents also object to this request on the grounds that it may include their tax returns, "which contain far more information than related to the 'Dividend.'" (Doc. 45, Ex. B, p.7). The Court addresses the discoverability of Respondents' tax returns in section H below and therefore, will not address it here.

E. Request No. 5

This request seeks documents relating to loans made by or between any of the Respondents, Itera Group, SUCO and/or any third party from January 1, 2003 to the present. Respondents again object that this request is overly broad, burdensome and oppressive. Specifically, Respondents take issue with the time period and point out that the second tranche was purportedly paid in May 2005 and the alleged authorization of additional shares at issue in the Cypriot case occurred in February 2006. Additionally, Respondents argue this request is so broad that it would cover documents related to their personal consumer transactions. Petitioner responds by agreeing to tailor this request to "exclude any consumer transactions Respondents may have conducted with parties totally unrelated to Sweet Water Intervest, Itera Group, SUCO, Igor Makarov, any of the Respondents, or Petitioner." (Doc. 46, p.9).

The Court agrees that this request is overly broad. Because this request seeks documents which may be relevant in both the Swiss and Cypriot cases, the Court believes the relevant time period to again be from May 1, 2004 to February 28, 2007. Additionally, the Court believes Petitioner's suggested restrictions are reasonable. Accordingly, the Court directs Respondents to produce all documents relating to loans made to any of the Respondents by Makarov, Itera Group, SUCO, Sweet Water Intervest and/or Petitioner from May 1, 2004 to February 28, 2007.

F. Request No. 6

This request seeks documents relating to the sale, purchase, and/or transfer of Itera Group shares by any of the Respondents, Itera Group, SUCO and/or any other third party from January 1, 2003 to the present. Respondents again object on the grounds that this request is overly broad, burdensome and oppressive. Respondents point out that this request only seeks information relevant to the Cypriot case and therefore, the time frame is entirely too broad as the dilution of Petitioner's interest occurred in February 2006. (Doc. 45, Ex. B, pp. 9-10). Additionally, Respondents note that Itera Group Ltd. L.L.C. was not incorporated until August 2004. (Doc. 45, Ex. B, p. 9). Finally, Respondents argue that:

[t]he "sale, purchase, and/or transfer of Itera Group shares . . ." for the original incorporators (including petitioner, respondents and others) is equally available to Ms. Weber

particularly since her husband, Urs Weber, was the legal and financial architect and advisor to the creation of Itera Group and legal and financial advisor to Itera Group until he was discharged in July 2006.

Id.

Petitioner responds that although Itera Group Ltd. was not incorporated until 2004, the Itera Group family of companies has been in existence for many years and that Petitioner has been a shareholder of Itera Group or its predecessor corporation, Itera Group, NV. since 1995. (Doc. 46, p.9). Additionally, Petitioner argues she needs the documents going back to January 1, 2003 in order to:

(1) demonstrate the amounts and manner in which previous dividends were paid; (2) uncover how and in what pattern the amounts of the Dividend or other consideration was disbursed to Respondents; (3) prove the manner in which the capital increase was funded; and (4) demonstrate why the individual shareholders reneged on their offer to purchase Petitioner's shares in light of the pressure exerted and benefits offered by Itera Group or Igor Makarov.

Id. Like in the previous requests, Petitioner also argues that allowing her to obtain documents from the requested time period will provide "context to each irregular transaction and will provide concrete evidence that the treatment of Petitioner has been

different than the preferential treatment afforded to other shareholders.” *Id.*

While in her brief Petitioner takes the position that this request seeks documents regarding the payment of dividends and is therefore relevant to both the Swiss and Cypriot cases, the Court agrees with Respondents that this request does not seek information relevant to the Swiss action. Indeed, at the hearing, counsel for Petitioner stated that every request except Request 6 sought information regarding the second tranche. (Transcript of October 3 hearing, 22:22-24, 23:2-5). Accordingly, the Court believes the relevant time period (sufficient to provide Petitioner with some “context”) would be from May 1, 2004 to February 28, 2007.

As for Respondent’s argument that Itera Group Ltd. was not formed until August 2004, the Court believes this claim has some merit. Petitioner responds that she owned stock in the predecessor corporation, Itera Group NV. however, the Cypriot case deals with Petitioner’s claim that her stock in Itera Group Ltd. was improperly diluted. Accordingly, the Court will not require Respondents to produce any documents regarding the sale, purchase, and/or transfer of shares other than those of Itera Group Ltd.

Finally, the Court is not persuaded by Respondents’ argument that Petitioner has access to this information through her husband. Perhaps this argument would have more merit had Respondents

made a showing that responding to this request would be overly burdensome. However, Respondents have failed to do so and the Court will require them to produce documents regarding the sale, purchase, and/or transfer of shares of Itera Group Ltd. by any of the Respondents, Itera Group, SUCO and/or any other third party from August 1, 2004 to February 28, 2007.

G. Request No. 7

This request asks Respondents to produce documents relating to any agreement, negotiation, or offer to purchase, redeem, trade, transfer, or sell any of Petitioner's shares in Itera Group from January 1, 2003 to the present. Respondents asserted the same objections as for Request No. 6. Accordingly, for the same reasons as Request No. 6, the Court directs Respondents to produce documents relating to any agreement, negotiation, or offer to purchase, redeem, trade, transfer, or sell any of Petitioner's shares in Itera Group Ltd. from August 1, 2004 to February 28, 2007.

H. Request No. 8

This request seeks documents relating to Respondents' IRS reporting requirements, including returns, worksheets, schedules and other IRS forms, from January 1 2004 to the present. Respondents object to this request as being "overly broad, unduly vague, ambiguous, burdensome, oppressive and

unduly intrusive into the personal, financial and business affairs" of the Respondents. (Doc. 45, Ex. B, p. 10).

The Court will first address Respondents' objection that this request is unduly intrusive. While it appears courts are split as to whether tax returns are entitled to enhanced protection from discovery, this Court has noted that the Eleventh Circuit has not recognized any special privilege for tax returns and therefore, "the discoverability of tax returns has turned on relevance." *Shearson Lehman Hutton, Inc. v. Lambros*, 135 F.R.D. 195, 198 (M.D. Fla. 1990) (permitting the discovery of defendants' tax returns as they "may lead to admissible evidence concerning the merits of plaintiff's claims," however, limiting use of returns by plaintiff solely in connection with the case and disallowing any dissemination to third parties).

In the instant case, the Court believes the tax returns may produce relevant evidence particularly with respect to the Swiss action (as both parties agree that payment of a dividend is a reportable occurrence). As the second tranche was allegedly paid in 2005, the Court believes the 2005 tax returns may contain relevant information. The Court understands Respondents' concern in turning over private financial materials, however, Respondents have not shown that the production of this relevant information would be harmful. *Gober v. City of Leesburg*, 197 F.R.D. 519, 521 (M.D. Fla. 2000) (holding that the party resisting discovery has the burden to show that

the information sought is confidential and that disclosure would be harmful) (citing, *Kaiser Aluminum & Chemical Corp. v. Phosphate Engineering and Const. Co., Inc.*, 153 F.R.D. 686, 688 (M.D. Fla. 1994)). Counsel for Petitioner has agreed to receive this information on an "attorneys eyes only" basis and the Court believes this to be prudent. Accordingly, the Court will direct Respondents to produce their tax returns for 2005. Counsel for Petitioner is advised to ensure that only the attorneys representing Petitioner in the instant matter have access to the tax returns until such time as it is established they contain relevant information to be utilized in one of the foreign actions.

As for Petitioner's request for the tax returns for 2004 and 2006, the Court is not certain they will produce relevant information. The Court is allowing discovery of the 2005 returns because Petitioner has pointed to a reportable event (the payment of the second tranche). However, Petitioner has not pointed to any other reportable events and as such, the Court is inclined to limit discovery to the 2005 tax returns.

Accordingly, and after due consideration, it is

ORDERED:

Petitioner's Motion to Compel Discovery (Doc. 2) is **GRANTED in part and DENIED in part** as set forth in the body of this Order. Respondents are directed to produce the information noted in this Order no later than **Thursday, May 1, 2008**.

App. 37

DONE AND ENTERED in Chambers in Jacksonville, Florida this 15th day of April, 2008.

/s/ Monte C. Richardson
MONTE C. RICHARDSON
UNITED STATES
MAGISTRATE JUDGE

Copies to:

Counsel of Record

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 08-10063-F

GALINA WEBER,
In the Matter of Her
Application,

Petitioner-Appellee,

versus

LAZAR FINKER, an individual;
respondent discovery sought
from, RAISSA M. FRENKEL,
an individual; respondent
discovery sought from, STEVEN
CHARLES KOEGLER, an
individual; respondent dis-
covery sought from, WILLIAM
E. CHATTIN, an individual;
respondent discovery sought
from, THEODORUS J. KA-
VALIEROS, an individual;
respondent discovery sought
from, AFRODITI KAVALIE-
ROS, an individual; respon-
dent discovery sought from,

Respondents-Appellants,

IGOR V. MAKAROV,

Respondent.

Appeal from the United States District Court
for the Middle District of Florida

(Filed Apr. 9, 2008)

Before MARCUS, WILSON, and PRYOR, Circuit
Judges

BY THE COURT:

This appeal is DISMISSED for lack of jurisdiction. The district court's November 30, 2007, order referring the case to a magistrate judge to determine the scope of discovery and contemplating reviewing the magistrate's decision, is not final or immediately

*Atlantic Federal
Savings & Loan Ass'n v. Blythe Eastman Paine
Webber, Inc.*, 890 F.2d 371, 375-76 (11th Cir. 1989);
Pitney Bowes, Inc. v. Mestre

Broussard v. Lippman, 643 F.2d
1131, 1133 (5th Cir. Unit A Apr. 1981).

No motion for reconsideration may be filed unless it complies with the timing and other requirements of 11th Cir.R 40-4 and all other applicable rules.

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION**

IN THE MATTER OF
THE APPLICATION OF
GALINA WEBER,

Petitioner,

vs.

Case No.

3:07-mc-27-J-32MCR

FOR DISCOVERY FROM
LAZAR S. FINKER, etc.,
et al.,

Respondents.

ORDER¹

(Filed Nov. 30, 2007)

This case is before the Court on the Magistrate Judge's October 11, 2007 Report and Recommendation (Doc. 38), the Respondents' Objections (Doc. 41), and Petitioner's Response (Doc. 42). Upon independent *de novo* review, it is hereby

¹ Under the E-Government Act of 2002, this is a written opinion and therefore is available electronically. However, it has been entered only to decide the motion or matter addressed herein and is not intended for official publication or to serve as precedent.

ORDERED:

1. Respondents' Objections (Doc. 41) are **OVERRULED**.

2. The Magistrate Judge's Report and Recommendation (Doc. 38) is **ADOPTED** as the opinion of the Court.²

3. Petitioner's Amended Petition for Discovery in Aid of Foreign Proceedings (Doc. 37) is **GRANTED**.

4. The Magistrate Judge is directed to proceed to consideration of Petitioner's Motion to Compel Discovery (Doc. 2) so that a final decision on the scope of permissible discovery can be made. The Magistrate Judge is authorized to enter an Order (as opposed to a Report and Recommendation) on the Motion to Compel, which will be subject to review only if clearly erroneous or contrary to law. 28 U.S.C. § 636(b)(1)(A).

5. The Request for Oral Argument (Doc. 40) is **DENIED**.

DONE AND ORDERED at Jacksonville, Florida this 30th day of November, 2007.

/s/ Timothy J. Corrigan
TIMOTHY J. CORRIGAN
United States District Judge

² Respondent's Objections to Filing Declarations of Katia Kakoulli and Dr. Stephan Thurnherr (Doc. 27) are overruled without prejudice to renewal if appropriate at a later stage in the litigation.

S.

Copies:

Hon. Monte C. Richardson
United States Magistrate Judge
counsel of record

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

IN THE MATTER OF
THE APPLICATION OF
GALINA WEBER,

Petitioner,

vs.

FOR DISCOVERY FROM
LAZAR S. FINKER, an
individual, RAISSA M.
FRENKEL, an individual,
STEVEN CHARLES
KOEGLER, an individual,
WILLIAM E. CHATTIN,
an individual, THEODO-
ROS J. KAVALIEROS,
an individual, AFRODITI
KAVALIEROS, an indi-
vidual, and IGOR V.
MAKAROV, an individual,

Case No.

3:07-mc-27-J-32MCR

Respondents. /

REPORT AND RECOMMENDATION¹

(Filed Oct. 11, 2007)

THIS CAUSE is before the Court on Petitioner's Amended Petition for Discovery in Aid of Foreign Proceedings (Doc. 37).² On August 2, 2007, Judge Morris recused himself from this case (Doc. 29) and on October 3, 2007, the undersigned conducted a hearing regarding the Petition for Discovery.

I. BACKGROUND

On April 27, 2007, Petitioner filed a Petition for Discovery in Aid of Foreign Proceedings pursuant to 28 U.S.C. §1742(a). (Doc. 1). Petitioner, Galina Weber, is a citizen of Switzerland and a resident of Monaco. She is a shareholder of Itera Group, Ltd., a Cypriot corporation. Itera Group is a large company with many subsidiaries throughout the world. The Respondents are also shareholders of Itera Group and all

¹ Any party may file and serve specific, written objections hereto within TEN (10) DAYS after service of this Report and Recommendation. Failure to do so shall bar the party from a *de novo* determination by a district judge of an issue covered herein and from attacking factual findings on appeal. See 28 U.S.C. §636(b)(1); Fed.R.Civ.P. 729(a), 6(a) and (e); Local Rules 6.02(a) and 4.20, United States District Court for the Middle District of Florida.

² On October 3, 2007, the Court denied Respondents' Motion to Strike (Doc. 9) portions of the original Petition as moot as Petitioner agreed to file an Amended Petition without the objectionable portions and exhibits.

except for Igor Makarov ("Makarov"), reside in Jacksonville, Florida. Makarov is the CEO of Itera Group and resides in Moscow, Russia.³ Petitioner seeks discovery to assist her in two pending cases in foreign countries: a civil case in Cyprus and a criminal case against her in Switzerland.

A. The Cyprus case:

This civil lawsuit was filed by Petitioner against Itera Group, Makarov and Sweet Water Intervest Corporation (a British Virgin Islands corporation that Petitioner claims is associated with Makarov). The case claims that Makarov offered to buy Petitioner's 14% interest in Itera Group but failed to complete the transaction believing he could get her to sell the shares for less money. (Doc. 37, pp. 5-6). When Petitioner refused the subsequent offers, Itera Group's Board of Directors voted to increase the number of authorized shares in Itera Group by six million shares, thereby diluting Petitioner's entire ownership interest from 14% to 4%. (Doc. 37, p.7), Petitioner claims that the other shareholders were able to acquire additional shares because they received

³ During the October 3, 2007 hearing, counsel for Respondents indicated that any responsive documents for Makarov would be located in either Moscow, Russia or Lemassol, Cyprus. Based on this representation, counsel for Petitioner agreed to dismiss Makarov without prejudice from the Petition. Accordingly, the Court will not address the parties' arguments regarding whether the Court has jurisdiction over Mr. Makarov.

money from Itera Group or an affiliated company that Petitioner did not. (Doc. 37, p.7; Ex. A, p.3)

B. The Swiss case:

In the Fall of 2006, criminal charges were filed against Petitioner in Switzerland for allegedly embezzling Itera Group assets. The criminal charges were filed by Gas Itera, an Itera Group subsidiary, which claimed Petitioner, her husband and brother-in-law purchased real property belonging to Itera Group by offsetting the purchase price against a nonexistent debt Itera Group owed Petitioner. (Doc. 10, pp. 6-7). Petitioner's defense is that Itera Group owed her \$4.8 million in unpaid dividends. Under Swiss law, offsetting a debt in such a situation is a complete defense to embezzlement.

Specifically, Petitioner claims that in January 2005, the Itera Group Board of Directors approved payment of dividends to its shareholders in the amount of \$80 million to be dispersed in two tranches of \$40 million each. (Doc. 37, p.5). In March 2005, the first payment (or tranche) was made and all shareholders, including Petitioner, received a proportionate share of the dividend based on his/her ownership interest. *Id.* The distribution of the second tranche did not go as smoothly. According to Petitioner, the Itera Group Board of Directors approved the distribution of the second tranche at the May 28, 2005 meeting. (Doc. 37, p.6). However, Petitioner did not receive her full portion of the second tranche. She received an

amount equal to 2.5% ownership in Itera Group rather than the 14.5% ownership she claims she had. *Id.* The unpaid 12% would have been equal to \$4.8 million. (Doc. 37, p.7). Petitioner claims the Florida Shareholders (the Respondents), on the other hand, received the full amount of their second tranche. She claims they devised a scheme to avoid taxes on the second tranche whereby Itera Group paid these shareholders their share of the second tranche through a shell company in the form of a loan, rather than as a dividend, which would be taxable. (Doc. 37, p.6).

Petitioner now seeks to obtain discovery from the Respondents for use in both the Switzerland criminal case and the Cypress civil action pursuant to 28 §1782(a), which permits a district court in which a person resides or may be found to order that person to produce documents for use in a proceeding in a foreign country. Respondents object to the discovery on numerous grounds.

II. ANALYSIS

Because this request for discovery involves two separate cases, the Court will analyze each case individually to determine whether to permit the discovery for either or both cases.

A. The Swiss case

With respect to the Swiss case, Respondents take the position that Petitioner's request for discovery should be denied because the request for information is governed not by §1782(a), but rather by the United States – Swiss Mutual Assistance Treaty (the "Swiss Treaty"). Additionally, Respondents argue that if the discovery for the Swiss case is appropriate pursuant to §1782(a), the Court should recognize that the Swiss case is a criminal proceeding and apply the Federal Rules of Criminal Procedure rather than the Federal Rules of Civil Procedure. The Court will examine these arguments and determine whether to permit discovery for use in the Swiss case.

1. Whether the Swiss Treaty Controls

The Court will first determine whether 28 U.S.C. §1782(a) applies as Petitioner, urges or whether the request for discovery is governed by the Swiss Treaty as Respondents contend. Respondents argue the Swiss Treaty takes precedence over §1782(a) because it was enacted after the last amendment of §1782(a). (Doc. 10, p.13). Petitioner responds that the Swiss Treaty and §1782(a) are not inconsistent and therefore, the Swiss Treaty does not preempt §1782(a). (Doc. 16, p.7). Moreover, Petitioner argues that even using Respondents' logic, the Treaty would not trump §1782(a) because §1782(a) was amended after the enactment of the Treaty in 1996. (Doc. 16, p.8).

The Court agrees with Petitioner that in this case, §1782(a) would apply. As both sides correctly note, the Swiss Treaty takes precedence over an **inconsistent** law. However, Respondents have pointed to no inconsistencies between §1782(a) and the Swiss Treaty. Indeed, "[t]he court must read [1782(a)] as consistent with the [Swiss] Treaty if at all possible." *In re Request From Swiss Federal Dept. of Justice and Police*, 731 F.Supp. 490, 491 (S.D. Fla.1990) (citing *United States v. Lee Yen Tai*, 185 U.S. 213, 221-22, 22 S.Ct. 629 (1902) and *United States v. Vetco, Inc.*, 691 F.2d 1281, 1286 (9th Cir. 1981)). Accordingly, the Court finds the Swiss Treaty does not preempt §1782 in this case. Therefore, Petitioner is not required to seek the documents pursuant to the Swiss Treaty but may avail herself of §1782(a).

2. Whether Petitioner Satisfies the Requirements of 28 U.S.C. §1782(a)

Having determined it was proper for Petitioner to seek the documents pursuant to §1782(a), the Court must now determine whether Petitioner satisfies the requirements of §1782(a) with respect to the Swiss case. 28 U.S.C. §1782(a) provides in relevant part:

The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations

conducted before formal accusation. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court. . . . The order may prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country or the international tribunal, for taking the testimony or statement or producing the document or other thing. To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure.

Plaintiff argues she is entitled to the documents from Respondents because she satisfies all the statutory requirements under §1752(a). There are four statutory requirements which must be satisfied in order to obtain discovery pursuant to §1782(a): (1) the request must be made by an "interested person," (2) the request must seek evidence, such as the production of "a document or other thing," (3) the evidence must be "for use in a proceeding in a foreign or international tribunal," and (4) the person from whom discovery is sought must reside or be found in the district of the district court ruling on the application for assistance. *In re Clerici*, 481 F.3d 1324, 1331-32 (11th Cir. 2007). Petitioner claims she satisfies each of these

requirements. Petitioner is an interested person as she is one of the defendants in the Swiss case. Additionally, Petitioner seeks the production of documents which will aid her defense in the Swiss case and the persons from whom she seeks the documents reside or may be found in Jacksonville.

Respondents do not take issue with the first two requirements, that Petitioner is an interested person and that she is seeking evidence. Furthermore, as Petitioner dropped Makarov from the Petition, there is no longer any dispute regarding the final requirement: that the remaining Respondents reside in the Middle District of Florida. Instead, Respondents take the position that Petitioner does not need the documents for her Swiss case because Petitioner and her co-defendants have claimed to be in possession of documents supporting the sale of Itera Group property and the second tranche. (Doc. 10, p.7). Respondents argue that if Petitioner and her co-defendants would produce these documents, the Swiss criminal charges against them would be dropped. *Id.* During the October 3, 2007 hearing, counsel for Petitioner denied that his client had any such documents and assured the Court that if she did, she would not be seeking the documents from Respondents. The Court does not find Respondents' assertions that Petitioner already has all the documents she needs for the Swiss case to be sufficient to foreclose the requested discovery.

Accordingly, Petitioner satisfies the requirements of §1782(a). Even though the Court may find the statutory requirements of §1782(a) have been satisfied, the

Court is not required to allow the discovery. Instead, the Court is required to consider several factors and exercise its discretion as to whether to permit the discovery. *In re Clerici*, 481 F.3d at 1334 (citing, *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 264, 124 S.Ct. 2466, 2482-83 (2004)). In the Intel case, the Supreme Court discussed several "factors that bear consideration" by a district court "in ruling on a §1782(a) request." Intel, 542 U.S. at 263, 124 S.Ct. at 2483. These factors are:

- (1) whether "the person from whom discovery is sought is a participant in the foreign proceeding," because "the need for §1782(a) aid generally is not as apparent as it ordinarily is when evidence is sought from a non-participant";
- (2) "the nature of the foreign tribunal, the character of the proceedings underway abroad, and the receptivity of the foreign government or the court or agency abroad to U.S. federal-court judicial assistance";
- (3) "whether the §1782(a) request conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States";
- and (4) whether the request is otherwise "unduly intrusive or burdensome."

In re Clerici, 481 F.3d at 1334 (quoting, Intel, 542 U.S. at 264-65, 124 S.Ct. at 2483). Respondents argue that all but the first factor weigh against permitting the discovery. With respect to the second factor, "the nature of the foreign tribunal, the character of the proceedings underway abroad, and the receptivity of

the foreign government or the court or agency abroad to U.S. federal-court judicial assistance," Respondents have submitted an affidavit from the attorney representing Gas Itara in the Swiss matter, Christof Muller. (Doc. 22). Mr. Muller states:

I have a good faith, legally sustainable opinion, that the honorable Swiss Judge, Mrs. Tatjana Heller, in her function as Investigative Magistrate will rule any documents disclosed as a result of this US-Discovery to be inadmissible in the Swiss criminal-case.

(Doc. 22, p. 12). Mr. Muller based this statement on his understanding of the Swiss Treaty. *Id.* In response to this affidavit, Petitioner filed an affidavit from Petitioner's attorney in the Swiss case, Dr. Stephan Thurnherr. (Doc. 23). Dr. Thurnherr stated that he spoke with the Investigative Magistrate who:

firmly confirmed that she would review and consider any evidence produced from the Respondents in this American proceeding, as such evidence is clearly prescribed by art. 29 par. 2 of the Swiss Constitution (Bundesverfassung) and the St. Gallen Rules of Criminal Procedure . . .

(Doc. 23, p.9). Dr. Thurnherr also stated that the Magistrate "reiterated that it remain[ed] her discretion what weight to give the documents produced by the Respondents; however, she clearly would review and consider them." *Id.* The Court is presented with conflicting affidavits and does not intend to "try to glean the accepted practices and attitudes of other

nations from . . . conflicting and, perhaps, biased interpretations of foreign law," *Euromepa S.A. v. R. Esmerian, Inc.*, 51 F.3d 1095, 1099 (2nd Cir. 1995). Instead, the Court's inquiry into the foreign tribunal's attitudes toward discovery from the United States should be based only on "authoritative proof that a foreign tribunal would reject evidence obtained with the aid of section 1782," *Id.* at 1100. In the instant case, there is no such "authoritative proof" that the Swiss Magistrate would be unreceptive to any relevant, evidence uncovered through the discovery here. Accordingly, the Court finds there is no reason for the second factor to weigh against permitting the discovery.

As for the third factor, "whether the §1782(a) request conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States," Respondents argue that Petitioner's failure to attempt to obtain any documents through the Swiss discovery process indicates Petitioner may be attempting to circumvent Swiss proof-gathering restrictions or other policies. However, as Petitioner points out, she is not required to exhaust all Swiss discovery avenues before seeking discovery through §1782(a). *Euromepa*, 51 F.3d at 1098 (noting that there is no "quasi-exhaustion requirement" in §1782 "that would force litigants to seek 'information through the foreign or international tribunal' before requesting discovery from the district court.") (quoting, *In re Malev Hungarian Airlines*, 964 F.2d 97, 100 (2nd Cir. 1992), *cert. denied*, 506 U.S.

861, 113 S.Ct. 179 (1992)). In *Euromepa*, the court reversed a district court's denial of a §1782 petition partly on the grounds that the petitioner failed to attempt to obtain documents through French mechanisms before applying to the U.S. court. *Euromepa*, 51 F.3d at 1098. The district court recognized, that there was no exhaustion requirement in §1782 but still considered the failure to attempt to obtain the documents in France as bearing on whether the French court would be receptive to the documents. *Id.* The circuit court found this inappropriate. Likewise, in the instant case, the Court does not believe Petitioner's failure to obtain documents using the Swiss methods indicates an attempt to circumvent Swiss proof-gathering restrictions or other policies. Respondents do not point to any such restrictions or policies. As such, the Court finds no reason for the third factor to weigh against permitting the discovery.

Finally, with respect to the fourth factor, whether the request is otherwise "unduly intrusive or burdensome," the Court agrees the discovery requests may be overly broad and therefore, may need to be more narrowly tailored, however, Respondents have not convinced the Court that the requests are so unduly intrusive or burdensome to deny the discovery altogether. Instead, the Court believes it can address the over breadth or intrusiveness of the discovery requests when it rules on Petitioner's Motion to Compel (Doc. 2). Accordingly, the Court believes the discovery pursuant to §1782 should be permitted. After Judge Corrigan rules on the instant Report and

Recommendation, the undersigned will consider the Motion to Compel (Doc. 2) and will determine if and/or how the discovery may need to be trimmed.

3. Whether the Federal Rules of Civil or Criminal Procedure Apply

Next, the Court must determine whether Petitioner's discovery requests should be governed by the Federal Rules of Civil Procedure or as Respondents argue, the Federal Rules of Criminal Procedure. Respondents take the position that because the Swiss case is a criminal matter, any discovery sought by Petitioner pursuant to §1782(a) should be governed by the Federal Rules of Criminal Procedure, which contain limitations on pretrial discovery. (Doc. 10, pp. 14-18). Respondents do not cite any authority for their proposition and the Court was unable to find any cases in which the Federal Rules of Criminal Procedure were applied to a discovery request pursuant to §1782(a). Although the Court finds Respondents' argument logical, the Court ultimately finds it to be without merit.

Indeed, in *Application of Sumar*, 123 F.R.D. 467, 469-70 (S.D.N.Y. 1988), the respondents asked the court to apply the Federal Rules of Criminal Procedure to petitioner's efforts to compel discovery under Section 1782 because of the criminal nature of the foreign proceeding. The court declined, stating, the criminal nature of the Argentine investigation does not change the explicit direction of Section 1782. The

Federal Rules of Civil Procedure will be applied to petitioner's motion to compel." *Id.* (citing, *In re Request for International Judicial Assistance from Brazil*, 687 F.Supp. 880, 887 (S.D.N.Y. 1988) (reversed on other grounds)). In the *Brazil* case, the court determined that a subpoena for documents in a Brazilian criminal matter issued pursuant to §1782(a) would be governed by the Federal Rules of Civil Procedure. The court noted that §1782 speaks "generally in terms of the district court's discretion," but essentially gives the district court two sources to determine the procedures governing the discovery: the practice and procedure of the foreign country, or the Federal Rules of Civil Procedure." *Id.* The statute says nothing about the Federal Rules of Criminal Procedure and as this Court is unaware of the procedures of the Swiss court for producing documents, this Court believes it is appropriate to utilize the Federal Rules of Civil Procedure for the production of any documents.

Moreover, the Court agrees with Petitioner's argument that as pointed out in the *Clerici* case, §1782(a) "refers to the Federal Rules, not for whether the district court can order [the respondent to give any testimony, but only for the procedures or manner in which that testimony is to be taken." *In re Clerici*, 481 F.3d at 1336. In this case, the Respondents are not arguing that the Federal Rules of Criminal Procedure would require Petitioner to follow a different sort of procedure in order to obtain the documents. Instead, Respondents argue that the Federal Rules of

Criminal Procedure would require the Petitioner to make a stronger showing before being able to obtain the discovery from Respondents. Pursuant to the *Clerici* case, this argument is without merit.

Accordingly, the undersigned believes Petitioner is entitled to serve the discovery requests upon the Respondents pursuant to §1782(a) for use in the Swiss case.

B. The Cyprus Case

With respect to the Cyprus case, now that Makarov is no longer subject to the discovery requests, Respondents' arguments against the discovery in the Cyprus case are much more limited. Respondents argue that discovery pursuant to §1782(a) is inappropriate because Petitioner has not attempted to obtain the documents in Cyprus, thereby raising an inference that Petitioner is attempting to "circumvent foreign proof gathering restrictions or other policies of [Cyprus]." (Doc. 10, p.18). Additionally, Respondents contend that the requests are overly broad and unduly burdensome. (Doc. 10, pp.18-20).

Petitioner satisfies the four statutory requirements pursuant to §1782(a), however, the Court must again review the *Intel* factors to determine whether it should exercise its discretion to permit the discovery in the Cyprus case. As noted above, Respondents only raise issues with the third and fourth *Intel* factors. As with the Swiss case and for the same reasons, the Court finds neither of these factors weighs against

permitting the discovery. There is not sufficient evidence to believe Petitioner is trying to circumvent any Cypriot proof-gathering restrictions or other policies. Additionally, to the extent the discovery requests may be intrusive, burdensome or overly broad, the Court will address same in its ruling on Petitioner's Motion to Compel (Doc. 2). As such, the Court finds discovery pursuant to §1782(a) is appropriate for the Cyprus case as well.

Accordingly, and after due consideration, it is

RECOMMENDED:

The Amended Petition for Discovery in Aid of Foreign Proceedings (Doc. 37) be **GRANTED**.

DONE AND ENTERED in Chambers in Jacksonville, Florida this *11th* day of October, 2007.

/s/ Monte C. Richardson
MONTE C. RICHARDSON
UNITED STATES
MAGISTRATE JUDGE

Copies to:

Timothy J. Corrigan
United States District Judge,
Counsel of Record

28 U.S.C.A. § 1782. Assistance to foreign and international tribunals and to litigants before such tribunals

(a) The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court. By virtue of his appointment, the person appointed has power to administer any necessary oath and take the testimony or statement. The order may prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country or the international tribunal, for taking the testimony or statement or producing the document or other thing. To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure.

A person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable privilege.

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(b) This chapter does not preclude a person within the United States from voluntarily giving his testimony or statement, or producing a document or other thing, for use in a proceeding in a foreign or international tribunal before any person and in any manner acceptable to him.

28 U.S.C.A. § 1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

27 U.S.T. 2019

Switzerland

Mutual Assistance in Criminal Matters

Treaty signed at Bern May 25, 1973

And interpretative letters signed at Bern May 25, 1973 and December 23, 1975; Ratification advised by the Senate of the United States of America June 21, 1976; Ratified by the President of the United States of America July 10, 1976; Ratified by Switzerland July 7, 1976; Ratifications exchanged at Washington July 27, 1976; Proclaimed by the President of the United States of America August 9, 1976; Date of entry into force January 23, 1977.

*BY THE PRESIDENT OF THE UNITED STATES
OF AMERICA*

A PROCLAMATION

*TREATY BETWEEN THE UNITED STATES OF
AMERICA AND THE SWISS CONFEDERATION ON
MUTUAL ASSISTANCE IN CRIMINAL MATTERS*

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[INTERPRETATIVE LETTERS] [FN4]

*EMBASSY OF THE UNITED STATES OF AMERICA
EMBASSY OF THE UNITED STATES OF AMERICA
EIDGENÖSSISCHES POLITISCHES DEPARTMENT
EMBASSY OF THE UNITED STATES OF AMERICA
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EMBASSY OF THE UNITED STATES OF AMERICA
EIDGENÖSSISCHES POLITISCHES DEPARTEMENT*

BY THE PRESIDENT OF THE
UNITED STATES OF AMERICA

A PROCLAMATION

CONSIDERING THAT:

The Treaty between the United States of America and the Swiss Confederation on Mutual Assistance in Criminal Matters was signed at Bern on May 25,

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1973, along with six exchanges of interpretative letters of the same date, and an exchange of interpretative letters dated December 23, 1975, the texts of which Treaty and the interpretative letters, are hereto annexed;

The Senate of the United States of America by its resolution of June 21, 1976, two-thirds of the Senators present concurring therein, gave its advice and consent to ratification of the Treaty and the interpretative letters;

The Treaty and the interpretative letters were ratified by the President of the United States of America on July 10, 1976, in pursuance of the advice and consent of the Senate, and were duly ratified on the part of Switzerland;

It is provided in Article 41 of the Treaty that the Treaty shall enter into force 180 days after the date of the exchange of the instruments of ratification;

The instruments of ratification of the Treaty were exchanged at Washington on July 27, 1976; and accordingly the Treaty and the interpretative letters enter into force on January 23, 1977;

NOW, THEREFORE, I, Gerald R. Ford, President of the United States of America, proclaim and make public the Treaty and the interpretative letters, to the end that they shall be observed and fulfilled with good faith on and after January 23, 1977, by the United States of America and by the citizens of the

United States of America and all other persons subject to the jurisdiction thereof.

IN TESTIMONY WHEREOF, I have signed this proclamation and caused the Seal of the United States of America to be affixed.

DONE at the city of Washington this ninth day of August in the year of our Lord one thousand nine hundred seventy-six and of the Independence of the United States of America the two hundred first.

GERALD R. FORD

[SEAL]

By the President:

CHARLES W ROBINSON
Acting Secretary of State

TREATY BETWEEN THE UNITED STATES OF
AMERICA AND THE SWISS CONFEDERATION ON
MUTUAL ASSISTANCE IN CRIMINAL MATTERS

The President of the United States of America
and the Swiss Federal Council,

Desiring to conclude a treaty on mutual assistance in criminal matters,

Having appointed for that purpose as their Plenipotentiaries:

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The President of the United States of America:

Walter J. Stoessel, Jr.

Assistant Secretary of State for European Affairs

Shelby Cullom Davis

Ambassador Extraordinary and Plenipotentiary of the United States of America to Switzerland

The Swiss Federal Council:

Dr. Albert Weitnauer

Swiss Ambassador to Great Britain who, having exchanged their respective full powers, which were found in good and due form, have agreed as follows:

Chapter I
APPLICABILITY

Article 1

Obligation to Furnish Assistance

1. The Contracting Parties undertake to afford each other, in accordance with provisions of this Treaty, mutual assistance in:

a. investigations or court proceedings in respect of offenses the punishment of which falls or would fall within the jurisdiction of the judicial authorities of the requesting State or a state or canton thereof;

b. effecting the return to the requesting State, or a state or canton thereof, of any objects, articles or other property or assets belonging to it and obtained through such offenses;

c. proceedings concerning compensation for damages suffered by a person through unjustified detention as a result of action taken pursuant to this Treaty.

2. For the purposes of this Treaty, an offense in the requesting State is deemed to have been committed if there exists in that State a reasonable suspicion that acts have been committed which constitute the elements of that offense.

3. The competent authorities of the Contracting Parties may agree that assistance as provided by this Treaty will also be granted in certain ancillary administrative proceedings in respect of measures which may be taken against the perpetrator of an offense falling within the purview of this Treaty. Agreements to this effect shall be concluded by exchange of diplomatic notes.

4. Assistance shall include, but not be limited to:

a. ascertaining the whereabouts and addresses of persons;

b. taking the testimony or statements of persons;

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- c. effecting the production or preservation of judicial and other documents, records, or articles of evidence;
- d. service of judicial and administrative documents; and
- e. authentication of documents.

Article 2 Non-Applicability

1. This Treaty shall not apply to:
 - a. extradition or arrests of persons accused or convicted of having committed an offense;
 - b. execution of judgments in criminal matters;
 - c. investigations or proceedings:
 - (1) concerning an offense which the requested State considers a political offense or an offense connected with a political offense;
 - (2) concerning offenses in violation of the laws relating to military obligations;
 - (3) concerning acts by a person subject to military law in the requesting State which constitute an offense under military law in that State but which would not constitute an offense in the requested State if committed by a person not subject to military law in the requested State;
 - (4) for the purpose of enforcing cartel or antitrust laws; or

(5) concerning violations with respect to taxes, customs duties, governmental monopoly charges or exchange control regulations other than the offenses listed in items 26 and 30 of the Schedule to this Treaty (Schedule) and the related offenses in items 34 and 35 of the Schedule.

2. Nevertheless, assistance shall be granted if a request concerns an investigation or proceeding referred to in subparagraphs c. (1), (4) and (5) of paragraph 1, if made for the purpose of investigating or prosecuting a person described in paragraph 2 of Article 6 and

a. in the case of subparagraphs c. (1) and (4), the request relates to an offense committed in furtherance of the purposes of an organized criminal group described in paragraph 3 of Article 6, or

b. in the case of subparagraph c. (5), any applicable conditions of Article 7 are satisfied.

3. Contributions to social security and governmental health plans, even if levied as taxes, shall not be considered as taxes for the purpose of this Treaty.

4. If the acts described in the request contain all the elements of an offense for the investigation or prosecution of which assistance is required to be or may be granted as well as all the elements of an offense for which such assistance cannot be granted, assistance shall not be granted if under the law of the requested State punishment could be imposed only

for the latter offense unless it is listed in the Schedule.

Article 3
Discretionary Assistance

1. Assistance may be refused to the extent that:

a. the requested State considers that the execution of the request is likely to prejudice its sovereignty, security or similar essential interests;

b. the request is made for the purpose of prosecuting a person, other than a person described in paragraph 2 of Article 6, for acts on the basis of which he has been acquitted or convicted by a final judgment of a court in the requested State for a substantially similar offense and any sentence has been or is being carried out.

2. Before refusing any request pursuant to paragraph 1, the requested State shall determine whether assistance can be given subject to such conditions as it deems necessary. If it so determines, any conditions so imposed shall be observed in the requesting State.

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Article 4¹
Compulsory Measures

1. In executing a request, there shall be employed in the requested State only such compulsory measures as are provided in that State for investigations or proceedings in respect of offenses committed within its jurisdiction.

2. Such measures shall be employed, even if this is not explicitly mentioned in the request, but only if the acts described in the request contain the elements, other than intent or negligence, of an offense:

a. which would be punishable under the law in the requested State if committed within its jurisdiction and is listed in the Schedule; or

b. which is described in item 26 of the Schedule.

3. In the case of such an offense not listed in the Schedule, the Central Authority of the requested State shall determine whether the importance of the offense justifies the use of compulsory measures.

4. A decision as to whether the conditions of paragraph 2 have been met shall be made by the requested State only on the basis of its own law. Differences in technical designation and constituent

¹ In a letter dated Oct. 19, 1973, Switzerland informed the United States that in the context of art. 4 the use of the German word "soll" has the same meaning as the English word "shall".

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elements added to establish jurisdiction shall be ignored. The Central Authority of the requested State may ignore other differences in constituent elements which do not affect the general character of the offense in that State.

5. In those cases where the conditions of paragraph 2 or 3 have not been met, assistance shall be granted to the extent that it can be furnished without the use of compulsory measures.

Article 5

Limitations on Use of Information

1. Any testimony or statements, documents, records or articles of evidence or other items, or any information contained therein, which were obtained by the requesting State from the requested State pursuant to the Treaty shall not be used for investigative purposes nor be introduced into evidence in the requesting State in any proceeding relating to an offense other than the offense for which assistance has been granted.

2. Nevertheless, the materials described in paragraph 1 may, after the requested State has been so advised and given an opportunity to make its views known as to the applicability of subparagraphs a, b and c of this paragraph, be used in the requesting State for the investigation or prosecution of persons who:

a. are or were suspects in an investigation or defendants in a proceeding for which assis-

tance was granted and who are suspected or accused of having committed another offense for which assistance is required to be granted;

b. are suspected or accused of being participants in, or accessories before or after the fact to, an offense for which assistance was granted; or

c. are described in paragraph 2 of Article 6.

3. Nothing in this Treaty shall be deemed to prohibit governmental authorities in the requesting State from:

a. using the materials referred to in paragraph 1 in any investigation or proceeding concerning the civil damages connected with an investigation or proceeding for which assistance has been granted; or

b. using information or knowledge educed from the materials referred to in paragraph 1 in continuing any criminal investigation or proceeding, provided that:

(1) for such investigation or proceeding assistance may be given;

(2) prior to the date of the request for assistance referred to in paragraph 1 inquiries have already been carried out for the purpose of establishing an offense; and

(3) the materials referred to in paragraph 1 are not introduced into evidence.

Chapter II
SPECIAL PROVISIONS
CONCERNING ORGANIZED CRIME

Article 6
General Requirements

1. The Contracting Parties agree to assist each other in the fight against organized crime as provided in this Chapter and with all means otherwise available under this Treaty and other provisions of law.

2. This Chapter shall apply only to investigations and proceedings involving a person who, according to the request, is or is reasonably suspected to be:

a. knowingly involved in the illegal activities of an organized criminal group, described in paragraph 3, and who is:

(1) a member of such a group; or

(2) an affiliate of such a group performing supervisory or managerial functions or regularly supporting it or its members by performing other important services; or

(3) a participant in any important activity of such a group; or

b. a public official who has violated his official responsibilities in order to knowingly accommodate [sic] the desires of such a group or its members.

3. For the purposes of this Chapter the term "organized criminal group" refers to an association or group of persons combined together for a substantial or indefinite period for the purposes of obtaining

monetary or commercial gains or profits for itself or for others, wholly or in part by illegal means, and of protecting its illegal activities against criminal prosecution and which, in carrying out its purposes, in a methodical and systematic manner:

a. at least in part of its activities, commits or threatens to commit acts of violence or other acts which are likely to intimidate and are punishable in both States; and

b. either:

(1) strives to obtain influence in politics or commerce, especially in political bodies or organizations, public administrations, the judiciary, in commercial enterprises, employers' associations or trade unions or other employees' associations; or

(2) associates itself formally or informally with one or more similar associations or groups, at least one of which engages in the activities described under subparagraph b (1).

Article 7

Extent of Assistance

1. Compulsory measures referred to in Article 4 shall also be employed in the requested State even if the investigation or proceeding in the requesting State concerns acts which would not be punishable under the law in the requested State, or which are not listed in the Schedule, or neither. This paragraph is subject to the limitations of paragraph 2.

2. Assistance under this Chapter shall be rendered in investigations or proceedings involving violations of provisions on taxes on income referred to in Article I of the Convention of May 24, 1951, for the Avoidance of Double Taxation with Respect to Taxes on Income² only if, according to the information furnished by the requesting State:

a. the person involved in the investigation or proceeding is reasonably suspected by it of belonging to an upper echelon of an organized criminal group or of participating significantly, as a member, affiliate or otherwise, in any important activity of such a group;

b. the available evidence is in its opinion insufficient, for the purpose of a prosecution which has a reasonable prospect of success, to link such person with the crimes committed by the organized criminal group with which he is connected in the sense of paragraph 2 of Article 6; and

c. it has been reasonably concluded by it that the requested assistance will substantially facilitate the successful prosecution of such person and should result in his imprisonment for a sufficient period of time so as to have a significant adverse effect on the organized criminal group.

3. Paragraphs 1 and 2 apply only if the requesting State reasonably concludes that the securing of

² TIAS 2316; 2 UST 1753.

the information or evidence is not possible without the cooperation of the authorities in the requested State, or that it would place unreasonable burdens on the requesting State or a state or canton thereof.

Article 8 Applicable Procedure

1. In all cases where this Chapter requires a reasonable suspicion or a reasonable conclusion, or the opinion of the requesting State, that State shall furnish to the requested State information in its possession on the basis of which such suspicion, conclusion, or opinion has been arrived at. However, this shall not oblige the requesting State to identify the persons who have provided such information. Upon application of the requesting State, the Central Authority of the requested State shall treat any information furnished in the request as confidential.

2. The Central Authority of the requested State shall have the right to review the determination of the requesting State as to the applicability of this Chapter. It need not accept such determination where the suspicion, conclusion or opinion underlying such determination has not been made credible.

3. In rendering assistance pursuant to paragraph 2 of Article 7, all courts and authorities in the requested State shall apply such investigative measures as are provided for in its rules of criminal procedure.

4. Provisions in municipal law which impose restrictions on tax authorities concerning the disclosure of information shall not apply to disclosure to all authorities engaged in the execution of a request under paragraph 2 of Article 7. This paragraph shall not limit the applicability of provisions for disclosure otherwise provided by municipal laws in the Contracting States.

Chapter III OBLIGATIONS OF REQUESTED STATE IN EXECUTING REQUESTS

Article 9

General Provisions for Executing Requests

1. Except as otherwise provided in this Treaty, a request shall be executed in accordance with the usual procedure under the laws applicable for investigations or proceedings in the requested State with respect to offenses committed within its jurisdiction.

2. The requested State may, upon application by the requesting State, consent to apply the procedures applicable in that State for:

- a. investigations or proceedings; and
- b. certification and transmission of documents, records or articles of evidence;

to the extent that such procedures are not incompatible with the laws in the requested State. A search or seizure may only be made in accordance with the law of the place where the request is executed.

3. The appropriate judicial officers and other officials in each of the two States shall, by all legal means within their power, assist in the execution of requests from the other State.

Article 10

Duty to Testify in Requested State

1. A person whose testimony or statement is requested under this Treaty shall be compelled to appear, testify and produce documents, records and articles of evidence in the same manner and to the same extent as in criminal investigations or proceedings in the requested State. Such person may not be so compelled if under the law in either State he has a right to refuse. If any person claims that such a right is applicable in the requesting State, the requested State shall, with respect thereto, rely on a certificate of the Central Authority of the requesting State.

2. The Swiss Central Authority shall, to the extent that a right to refuse to give testimony or produce evidence is not established, provide evidence or information which would disclose facts which a bank is required to keep secret or are manufacturing or business secrets, and which affect a person who, according to the request, appears not to be connected in any way with the offense which is the basis of the request, only under the following conditions:

a. the request concerns the investigation or prosecution of a serious offense;

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b. the disclosure is of importance for obtaining or proving facts which are of substantial significance for the investigation or proceeding; and

c. reasonable but unsuccessful efforts have been made in the United States to obtain the evidence or information in other ways.

3. Whenever the Swiss Central Authority determines that facts of the nature referred to in paragraph 2 would have to be disclosed in order to comply with the request, it shall request from the United States information indicating why it believes that paragraph 2 does not prevent such disclosure. Where, in the opinion of the Swiss Central Authority, such belief has not been made credible, it need not accept the determination of the United States.

4. Any acts of a witness or other person, in connection with the execution of a request, which would be punishable if committed against the administration of justice in the requested State shall be prosecuted in that State in accordance with the laws and enforcement policies therein, regardless of the procedure applied in executing the request.

Article 11 Locating Persons

If in the opinion of the requesting State information as to the location of persons who are believed to be within the territory of the requested State is of

importance in an investigation or proceeding pending in the requesting State, the requested State shall make every effort to ascertain the whereabouts and addresses of such persons in its territory.

Article 12

Special Procedural Provisions

1. Upon express application of the requesting State that the testimony or statement of a person be under oath or affirmation, the requested State shall comply with such request even in the event no provisions therefor exist in its procedural laws. In that event, the time and form of the oath or affirmation shall be governed by the procedural provisions applicable in the requesting State. Where an oath is incompatible with law, an affirmation may be substituted, even though an oath has been requested, and testimony or a statement so obtained shall be admitted in the requesting State as though given under oath.

2. The presence of the suspect or defendant, his counsel or both, at the execution of a request will be permitted whenever the requesting State so requests.

3. (a) Where the presence of representatives of an authority in the requesting State at the execution of a request is required by its law in order to obtain admissible evidence, the requested State shall permit such presence.

(b) Where the requested State agrees that the complexity of the matter involved or other special factors described in the request for assistance indicate that such presence is likely to substantially facilitate a successful prosecution, it shall also permit such presence.

(c) In other cases the requested State may also permit such presence upon application by the requesting State.

(d) Nevertheless, if such presence would result in providing to the United States facts which in Switzerland a bank is required to keep secret, or facts which are manufacturing or business secrets therein, Switzerland shall permit such presence only where the requirements for disclosure in paragraph 2 of Article 10 have been met.

(e) Switzerland may, furthermore, at any time in the course of the execution of a request, exclude such representatives until it has been determined whether such requirements for disclosure are met.

4. Any person whose presence is permitted under paragraph 2 or 3 shall have, in accordance with the procedures in the requested State, the right to ask questions which are not improper under the laws of either State.

5. If in the requested State testimony or statements are sought in accordance with the procedures in the requesting State, persons giving such testimony or statements shall be entitled to retain counsel

who may assist them during the proceeding. Such persons shall be expressly advised at the beginning of the proceeding of their right to counsel. After consent has been given by the Central Authority of the requesting State, counsel may be appointed, if necessary.

6. If the requesting State expressly requests that a verbatim transcript be taken, the executing authority shall make every effort to comply.

Chapter IV OBLIGATIONS OF REQUESTING STATE

Article 13 Restrictions on Use of Testimony

Any testimony obtained pursuant to this Treaty from a citizen of the requested State, interrogated as a witness and not advised of his right to refuse testimony under paragraph 1 of Article 10, may not be introduced as evidence against such witness in a criminal proceeding in the requesting State unless the prosecution is for an offense against the administration of justice.

Article 14
Exclusion of Sanctions

No citizen of the requested State who has refused to give non-compulsory testimony or information or against whom compulsory measures had to be applied in the requested State pursuant to this Treaty shall be subjected to any legal sanction in the requesting State solely because he has exercised such rights as permitted under this Treaty.

Article 15
Protection of Secrecy

Evidence or information disclosed by the requested State pursuant to paragraph 2 of Article 10 shall, if in the opinion of that State its importance so requires and an application to that effect is made, be kept from public disclosure to the fullest extent compatible with constitutional requirements in the requesting State.

Chapter V
DOCUMENTS, RECORDS
AND ARTICLES OF EVIDENCE

Article 16
Court and Investigative Documents

1. Upon request, the requested State shall make available to the requesting State on the same conditions and to the same extent as they would be available to authorities performing comparable

functions in the requested State the following documents and articles:

- a. judgments and decisions of courts; and
- b. documents, records, and articles of evidence, including transcripts and official summaries of testimony, contained in the files of a court or an investigative authority, whether or not obtained by grand juries.

2. Items specified in subparagraph b of paragraph 1 shall be furnished only if they relate solely to a closed case, or to the extent determined by the Central Authority of the requested State in its discretion.

Article 17

Completeness of Documents

All documents and records to be furnished, whether originals or copies thereof or extracts therefrom, shall be complete and in unedited form except to the extent paragraph 1 of Article 3 applies or the documents or records would disclose facts described in paragraph 2 of Article 10 and the requirements of subparagraphs a, b and c thereof are not met. Upon application of the requesting State, the requested State shall make every effort to furnish original documents and records.

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Article 18 Business Records

1. If the production of a document, including a book, paper, statement, record, account or writing, or extract therefrom, other than an official document provided for in Article 19, of whatever character and in whatever form is requested, the official executing the request shall, upon specific request of the requesting State, require the production of such document pursuant to a procedural document. The official shall interrogate under oath or affirmation the person producing such document and examine it in order to determine if it is genuine and if it was made as a memorandum or record of an act, transaction, occurrence, or event, if it was made in the regular course of business and if it was the regular course of such business to make such document at the time of the act, transaction, occurrence or event recorded therein or within a reasonable time thereafter.

2. The official shall cause a record of the testimony taken to be prepared and shall annex it to the document.

3. If the official is satisfied as to the matters set forth in paragraph 1, he shall certify as to the procedure followed and his determinations and shall authenticate by his attestation the document, or a copy thereof or extract therefrom, and the record of the testimony taken. Such certification and attestation shall be signed by the official and state his

official position. The seal of the authority executing the request shall be affixed.

4. Any person subsequently transmitting the authenticated document shall certify as to the genuineness of the signature and the official position of the attesting person or, if there are any prior certifications, of the last certifying person, the final certification may be made by:

a. an official of the Central Authority of the requested State;

b. a diplomatic or consular official of the requesting State stationed in the requested State; or

c. a diplomatic or consular official of the requested State stationed in the requesting State.

5. Where a request under this Article pertains to a pending court proceeding, the defendant, upon his application, may be present or represented by counsel or both, and may examine the person producing the document as to its genuineness and admissibility. In the event the defendant elects to be present or represented, a representative of the requesting State or a state or canton thereof may also be present and put such questions to the witness.

6. Any document, copy thereof, entry therein or extract therefrom authenticated in accordance with this Article, and not otherwise inadmissible, shall be admissible as evidence of the act, transaction, occurrence or event in any court in the requesting

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State without any additional foundation or authentication.

7. In the event that the genuineness of any document authenticated in accordance with this Article is denied by any party to a proceeding, he shall have the burden of establishing to the satisfaction of the court before which the proceeding is pending that such document is not genuine in order for the document to be excluded from evidence on such ground.

Article 19 Official Records

1. Upon request, the requested State shall obtain a copy of an official record, or an entry therein, and shall have it authenticated by the attestation of an authorized person. Such attestation shall be signed by, and state the official position of, the attesting person. The seal of the authority executing the request shall be affixed thereto. The procedures for certification set forth in paragraph 4 of Article 18 shall be followed.

2. In addition to any provision therefor in the municipal law of the requesting State, a copy of any official record in the requested State, or entry therein, shall be admissible in evidence without any additional foundation or authentication if authenticated and certified as provided in paragraph 1 and otherwise admissible.

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Article 20

Testimony to Authenticate Documents

1. The Central Authority of the requested State shall have the authority to summon persons to appear in that State before representatives of the requesting State or a state or canton thereof in order to produce documents, records or articles of evidence supplied or to be supplied by the requested State and give testimony with respect thereto, whenever, under the applicable law in the requesting State, that is necessary for their admissibility in evidence in a criminal proceeding and such State makes a request to that effect.

2. The Central Authority of the requested State shall have the right to designate a representative to be present at the proceeding under paragraph 1. He shall be entitled to object to questions which either:

- a. are incompatible with the law and practices in the requested State; or
- b. go beyond the scope of paragraph 1.

Article 21

Rights in Articles of Evidence

If the requested State, a state or canton thereof, or a third party claims title or other rights in documents, records or articles of evidence, the production of which was requested or effected, such rights shall be governed by the law of the place where they have been acquired. An obligation for production or

surrender under this Treaty shall take precedence over the rights referred to in the preceding sentence. These rights, however, remain otherwise unaffected.

Chapter VI
SERVICE FOR REQUESTING
STATE AND RELATED PROVISIONS

Article 22
Service of Documents

1. The competent authority in the requested State shall effect service of any procedural document, including a court judgment, decision or similar document, which is transmitted to it for this purpose by the requesting State. Unless service in a particular form is requested, it may be effected by registered mail. The requested State shall, upon application, effect personal service or, if consistent with the law in the requested State, service in any other form.

2. The requested State may refuse to effect service of legal process on a person, other than a national of the requesting State, calling for his appearance as a witness in that State if the person to be served is a defendant in the criminal proceeding to which the request relates.

3. A request must be received by the Central Authority of the requested State not later than 30 days before the date set for any appearance. This time limit must be taken into consideration when setting the date for the appearance and forwarding the request. This period may be shortened by the

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Central Authority of the requested State in very urgent cases.

4. Proof of service shall be made by a receipt dated and signed by the person served or by a declaration specifying the form and date of service and signed by the person effecting it.

Article 23 Personal Appearance

1. When the personal appearance of a person, other than a defendant in the criminal proceeding to which the request relates, is considered especially necessary in the requesting State, such State shall so indicate in its request for service and shall state the subject matter of the interrogation. It will also indicate the kind and amount of allowances and expenses payable.

2. The executing authority shall invite the person served to appear before the appropriate authority in the requesting State and ask whether he agrees to the appearance. The requested State shall promptly notify the requesting State of the answer.

3. If requested by the requesting State, the requested State may grant an advance payment to the person agreeing to appear. This shall be recorded on the document calling for his appearance and taken into consideration by the requesting State when making payment.

Article 24
Effect of Service

1. A person, other than a national of the requesting State, who has been served with legal process calling for his appearance in the requesting State, pursuant to Article 22, shall not be subjected to any civil or criminal forfeiture, other legal sanction or measure of restraint because of his failure to comply therewith, even if the document contains a notice of penalty.

2. The effect in the proceeding to which any procedural document served pursuant to Article 22 relates, arising from a refusal to accept it or comply therewith, shall be governed by the law in the requesting State.

3. Service of a procedural document pursuant to Article 22 on a person, other than a national of the requesting State, does not confer jurisdiction in the requesting State.

Article 25
Compelling Testimony in Requesting State

1. A person appearing before an authority in the requesting State pursuant to a legal process served under this Treaty may not be compelled to give testimony, make a statement or produce a document, record or article of evidence if under the law in either State he has a right to refuse, or if paragraph 2 below is applicable. Such a right shall be deemed to exist in the requested State to the extent that it could be

invoked there if the acts which are the subject of the investigation or proceeding had been committed within its jurisdiction.

2. Such a person appearing before an authority in the United States may only be compelled to give testimony, make a statement or produce a document, record or article of evidence which would disclose facts described in paragraph 2 of Article 10 to the extent that the requirements of subparagraphs a, b and c thereof are met.

3. If any person claims that a right to refuse, pursuant to paragraph 1, exists in the requested State, or invokes the restrictions of paragraph 2, the requesting State shall in that regard rely on a certificate of the Central Authority of the requested State except that, after due consideration of the certificate, the requesting State may make its own determination as to the applicability of subparagraphs a, b and c of paragraph 2 of Article 10.

Article 26

Transfer of Arrested Persons

1. A request pursuant to Article 22 may also be made if a person held in custody by an authority in the requested State is needed as a witness or for purposes of confrontation before an authority in the requesting State.

2. The person in custody shall be made available to the requesting State if:

- a. he consents;
- b. no substantial extension of his custody is anticipated; and
- c. the Central Authority of the requested State determines that there are no other important reasons against the transfer.

3. Execution of the request may be postponed for as long as the presence of the person is necessary for a criminal investigation or proceeding in the requested State.

4. The requesting State shall have authority, and be obligated, to keep the person in custody unless the requested State authorizes his release. The requesting State shall return the person to the custody of the requested State as soon as circumstances permit or as otherwise agreed. That person, however, shall have the right to use such remedies and recourses as are provided by the law in the requesting State to assure that his custody or return is consistent with this Article and the Constitution of that State.

5. The requesting State shall not decline to return a person transferred solely because such person is a national of that State.

Article 27

Safe Conduct

1. A person appearing before an authority in the requesting State pursuant to legal process served

under this Treaty shall not be prosecuted or, except as provided in paragraph 4 of Article 26, be detained or subjected to any other restriction of his personal liberty in that State with respect to any act or conviction which preceded his departure from the requested State.

2. The restrictions of paragraph 1 shall not apply as to a person of whatever nationality appearing for the purpose of answering a criminal charge with respect to any act or conviction which is mentioned in the document calling for his appearance, or a lesser included offense.

3. The safe conduct provided in this Article shall cease if ten days after the person appearing has been officially notified that his appearance is no longer required he has not used the opportunity to leave the requesting State or, after having left it, has returned.

Chapter VII GENERAL PROCEDURES

Article 28 Central Authority

1. Requests for assistance shall be handled by a Central Authority. For the United States, the Central Authority shall be the Attorney General or his designee. For Switzerland, the Central Authority shall be the Division of Police of the Federal Department of Justice and Police in Bern.

2. Such requests which are approved by the Central Authority of the requesting State shall be made by that Authority on behalf of federal, state or cantonal courts or authorities which by law have been authorized to investigate or prosecute offenses.

3. The Central Authorities of the two States may communicate with each other directly for the purpose of carrying out the provisions of this Treaty.

Article 29 Content of Requests

1. A request for assistance shall indicate the name of the authority conducting the investigation or proceeding to which the request relates and insofar as possible shall also indicate:

a. the subject matter and nature of the investigation or proceeding and, except in cases of requests for service, a description of the essential acts alleged or sought to be ascertained;

b. the principal need for the evidence or information sought; and

c. the full name, place and date of birth, address and any other information which may aid in the identification of the person or persons who are at the time of the request the subject of the investigation or proceeding.

2. Such requests, to the extent necessary and insofar as possible, shall include:

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a. information described under subparagraph c of paragraph 1 concerning any witness or other person who is affected by the request;

b. a description of the particular procedure to be followed;

c. a statement as to whether sworn or affirmed testimony or statements are required;

d. a description of the information, statement or testimony sought;

e. a description of the documents, records or articles of evidence to be produced or preserved as well as a description of the appropriate person to be asked to produce them and the form in which they should be reproduced and authenticated; and

f. information as to the allowances and expenses to which a person appearing in the requesting State will be entitled.

Article 30

Language

1. Requests for assistance and all accompanying documents shall be accompanied by a translation into French in the case of a request to Switzerland, and into English in the case of a request to the United States. The Swiss Central Authority may, whenever necessary, request a translation into German or Italian instead of French.

2. The translation of all transcripts, statements, or documents made, or documents or records obtained, in executing the request shall be incumbent upon the requesting State.

Article 31
Execution of Requests

1. If, in the opinion of the Central Authority of the requested State, a request does not comply with the provisions of this Treaty, it shall immediately so advise the Central Authority of the requesting State, giving the reasons therefor. The Central Authority of the requested State may take such preliminary action as it may deem advisable.

2. If the request complies with the Treaty, the Central Authority of the requested State shall transmit the request for execution to the federal, state or cantonal court or authority having jurisdiction or selected by the Central Authority as appropriate. The court or authority to which a request is transmitted shall have all of the jurisdiction, authority and power in executing the request which it has in investigations or proceedings with respect to an offense committed within its jurisdiction. In the case of a request by Switzerland, this paragraph shall authorize the use of grand juries to compel the attendance and testimony of witnesses and the production of documents, records and articles of evidence.

3. The court or authority to which a request is transmitted pursuant to paragraph 2 shall, when

necessary, issue a procedural document in accordance with its own procedural law to require the attendance and statement or testimony of persons, or the production or preservation of documents, records or articles of evidence.

4. With the consent of the Central Authority of the requesting State, execution of a request may be entrusted to an appropriate private party, if circumstances so require.

5. A request shall be executed as promptly as circumstances permit.

Article 32

Return of Completed Requests

1. Upon completion of a request, the executing authority shall return the original request together with all information and evidence obtained, indicating place and time of execution, to the Central Authority of the requested State. The latter shall forward it to the Central Authority of the requesting State.

2. The delivery of documents, records or articles of evidence may be postponed if they are needed in an official action pending in the requested State and, in case of documents or records, copies have been offered to the requesting State.

Article 33
Inability to Comply

The requested State shall promptly inform the requesting State with a brief statement of the reasons when a request cannot be fully complied with because:

- a. of the limitations of this Treaty;
- b. after diligent search, the person whose testimony or statement is sought or who is to be served cannot be located or is believed to be dead;
- c. after diligent search, the evidence cannot be located; or
- d. of other physical impediments.

Article 34
Costs of Assistance

1. The following expenses incurred by an authority in the requested State in carrying out a request shall, upon application, be paid or reimbursed by the requesting State: travel expenses; fees of experts; costs of stenographic reporting by other than salaried government employees; costs of interpreters; costs of translation; and fees of private counsel appointed with the approval of the requesting State for a person giving testimony or for a defendant.

2. No reimbursement shall be claimed for any other expenses.

3. All expenses incurred in relation to a request pursuant to Article 26 shall be borne by the requesting State.

4. No bond, guarantee, or other security for the expected costs shall be required.

Article 35

Return of Articles of Evidence

Any original documents, records or articles of evidence, delivered in execution of a request, shall be returned by the requesting State as soon as possible, unless the requested State declares that return will not be required. However, an authority in the requesting State shall be entitled to retain articles for disposition in accordance with its law if such articles belong to persons in that State and if no title or other rights are claimed in such articles by a person in the requested State, or if any claims with respect to such rights have been secured.

Chapter VIII

NOTICE AND REVIEW OF DETERMINATIONS

Article 36

Notice

Upon receipt of a request for assistance, the requested State shall notify:

a. any person from whom a statement or testimony or documents, records, or articles of evidence are sought;

b. any suspect or defendant in a criminal investigation or proceeding in the requesting State who resides in the requested State if the municipal law in the requesting State generally or for admissibility of evidence so requires, and that State so requests; and

c. any defendant in a criminal proceeding in the requesting State, where the law in the requested State requires such notice.

Article 37

Review of Determinations

1. The existence of restrictions in this Treaty shall not give rise to a right on the part of any person to take any action in the United States to suppress or exclude any evidence or to obtain other judicial relief in connection with requests under this Treaty, except with respect to paragraph 2 of Article 9; paragraph 1 of Article 10; Article 13; paragraph 7 of Article 18; paragraph 1 of Article 25; and Articles 26 and 27.

2. The right to and procedures for appeal in Switzerland against decisions of Swiss authorities in connection with requests under this Treaty shall be regulated in accordance with this Treaty by domestic legislation.

3. In the case of any claim that a State, either as the requesting State or the requested State, has failed to comply with obligations imposed by this Treaty and as to such claim a remedy is not provided by paragraph 1 or 2, the claimant may inform the

Central Authority of the other State. Where such claim is deemed by that other State to require explanation, an inquiry shall be put to the first-mentioned State; if necessary, the matter shall be resolved under Article 39.

Chapter IX FINAL PROVISIONS

Article 38

Effect on Other Treaties and Municipal Laws

1. Whenever the procedures provided by this Treaty would facilitate assistance in criminal matters between the Contracting Parties provided under any other convention or under the law in the requested State, the procedure provided by this Treaty shall be used to furnish such assistance. Assistance and procedures provided by this Treaty shall be without prejudice to, and shall not prevent or restrict, any available under any other international convention or arrangement or under the municipal laws in the Contracting States.

2. This Treaty shall not prevent the Contracting Parties from conducting investigations and proceedings in criminal matters in accordance with their respective municipal laws.

3. The provisions of this Treaty shall take precedence over any inconsistent provisions of the municipal laws in the Contracting States.

4. The furnishing of information for use in cases concerning taxes which come under the Convention of May 24, 1951, for the Avoidance of Double Taxation with Respect to Taxes on Income, shall be governed exclusively by the provisions there-of, except for investigations or proceedings described in Chapter II of this Treaty to the extent that the conditions in paragraph 2 of Article 7 are satisfied.

Article 39

Consultation and Arbitration

1. When it appears advisable, representatives of the Central Authorities may exchange views in writing or meet together for an oral exchange of opinions on the interpretation, application or operation of this Treaty generally or as to a specific case.

2. The Central Authorities shall endeavor to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of this Treaty. Any dispute between the Contracting Parties as to the interpretation or application of the present Treaty, not satisfactorily resolved by the Central Authorities or through diplomatic negotiation between the Contracting Parties, shall, unless they agree to settlement by some other means, be submitted, upon request of either Contracting Party, to an arbitral tribunal of three members. Each Contracting Party shall appoint one arbitrator who shall be a national of that State and these two arbitrators shall

nominate a chairman who shall be a national and resident of a third State.

3. If either Contracting Party fails to appoint its arbitrator within three months from the date of the request for the submission of the dispute to arbitration, he shall be appointed, at the request of either Party, by the President of the International Court of Justice.

4. If both arbitrators cannot agree upon the choice of a chairman within two months following their appointment, he shall be appointed, at the request of either Contracting Party, by the President of the International Court of Justice.

5. If, in the cases specified under paragraphs 3 and 4, the President of the International Court of Justice is prevented from acting or is a national of one of the Parties, the appointments shall be made by the Vice-President. If the Vice-President is prevented from acting or is a national of one of the Parties, the appointments shall be made by the next senior Judge of the Court who is not a national of either Party.

6. Unless the Contracting Parties decide otherwise, the tribunal shall determine its own procedure.

7. The decisions of the tribunal shall be binding on the Contracting Parties.

Article 40
Definition of Terms

1. In this Treaty:

a. the terms "requesting State" and "requested State" shall be deemed to mean the United States of America or the Swiss Confederation, as the context requires;

b. the term "state" or "states" shall be deemed to mean any one or more of the states of the United States of America, its territories and possessions, the District of Columbia and the Commonwealth of Puerto Rico, as the context requires;

c. the term "canton" or "cantons" shall be deemed to mean any one or more of the cantons of the Swiss Confederation;

d. in any place where the word "in" precedes "requesting State" or "requested State", the phrase is used to refer to all of the territory under the jurisdiction of the United States including its states as defined in subparagraph b, and subdivisions thereof, or to the territory of Switzerland, including its cantons, as, and to the extent, the context requires; and

e. references to law or procedure in the requesting State or law or procedure to be used in executing requests, are, respectively, intended to refer to the law or procedure which is applicable to the investigation or proceeding being conducted or which would ordinarily be used in comparable investigations or proceedings by the authority executing the request.

2. Where a provision of this Treaty requires the use of a seal by an authority, other than the Central Authority, that authority may employ a hand stamp in lieu thereof, if that authority customarily uses such a stamp in connection with its own matters of like importance. The imprint of such stamp shall be treated as a seal for the purposes of this Treaty and the admissibility of evidence.

3. The expression "articles of evidence" shall not be construed to exclude items which may not be admissible in evidence.

4. Provisions in this Treaty as to admissibility of evidence shall not affect the principle of free consideration of evidence insofar as the courts of Switzerland are concerned.

5. References to assistance required to be, or which may be, furnished pursuant to this Treaty shall be deemed to include assistance of a compulsory as well as noncompulsory nature.

6. References to a "request" or "request for assistance" shall be deemed to include any attachments and supplements thereto.

7. References to "acts" in connection with offenses shall be deemed to include omissions.

8. The term "defendant" shall, unless the context otherwise indicates, be deemed to include a suspect who is a subject of an investigation.

9. The term "counsel" shall be deemed to mean counsel admitted in either State.

10. The term "antitrust laws", as applied to laws in the United States, refers to those provisions compiled in Chapter 1, Title 15, United States Code, and Chapter 2 of the same Title up to but not including Section 77a, et seq.

Article 41

Entry into Force and Termination

1. This Treaty shall be ratified and the instruments of ratification shall be exchanged at Washington as soon as possible.

2. This Treaty shall enter into force 180 days after the date of the exchange of the instruments of ratification³ and apply with respect to acts committed before or after entry into force of this Treaty.

3. This Treaty may be terminated by either Contracting Party at any time after five years from entry into force, provided that at least six months prior notice of termination has been given in writing.

³ Jan. 23, 1977.

IN WITNESS WHEREOF the Plenipotentiaries have signed this Treaty.

DONE at Bern, in duplicate, in the English and German languages, the two texts being equally authoritative, this 25th of May, 1973.

(Signature)

Walter J. Stoessel

(Signature)

Shelby Cullom Davis

(Signature)

A. Weitnauer

[SEAL]

SCHEDULE

OFFENSES FOR WHICH COMPULSORY MEASURES ARE AVAILABLE

1. Murder.
2. Voluntary manslaughter.
3. Involuntary manslaughter.
4. Malicious wounding; inflicting grievous bodily harm intentionally or through gross negligence.
5. Threat to commit murder; threat to inflict grievous bodily harm.
6. Unlawful throwing or application of any corrosive or injurious substances upon the person of another.

7. Kidnaping; false imprisonment or other unlawful deprivation of the freedom of an individual.

8. Willful nonsupport or willful abandonment of a minor or other dependent person when the life of that minor or other dependent person is or is likely to be injured or endangered.

9. Rape; indecent assault.

10. Unlawful sexual acts with or upon children under the age of sixteen years.

11. Illegal abortion.

12. Traffic in women and children.

13. Bigamy.

14. Robbery.

15. Larceny; burglary; house-breaking or shop-breaking.

16. Embezzlement; misapplication or misuse of funds.

17. Extortion; blackmail.

18. Receiving or transporting money, securities or other property, knowing the same to have been embezzled, stolen or fraudulently obtained.

19. Fraud, including:

a. obtaining property, services, money or securities by false pretenses or by defrauding by

means of deceit, falsehood or any fraudulent means;

b. fraud against the requesting State, its states or cantons or municipalities thereof;

c. fraud or breach of trust committed by any person;

d. use of the mails or other means of communication with intent to defraud or deceive, as punishable under the laws of the requesting State.

20. Fraudulent bankruptcy.

21. False business declarations regarding companies and cooperative associations, inducing speculation, unfaithful management, suppression of documents.

22. Bribery, including soliciting, offering and accepting.

23. Forgery and counterfeiting, including:

a. the counterfeiting or forgery of public or private securities, obligations, instructions to make payment, invoices, instruments of credit or other instruments;

b. the counterfeiting or alteration of coin or money;

c. the counterfeiting or forgery of public seals, stamps or marks;

d. the fraudulent use of the foregoing counterfeited or forged articles;

e. knowingly and without lawful authority, making or having in possession any instrument, instrumentality, tool or machine adapted or intended for the counterfeiting of money, whether coin or paper.

24. Knowingly and willfully making, directly or through another, a false, fictitious or fraudulent statement or representation in a matter within the jurisdiction of any department or agency in the requesting State, and relating to an offense mentioned in this Schedule or otherwise falling under this Treaty.

25. Perjury, subornation of perjury and other false statements under oath.

26. Offenses against the laws relating to book-making, lotteries and gambling when conducted as a business.

27. Arson.

28. Willful and unlawful destruction or obstruction of a railroad, aircraft, vessel or other means of transportation or any malicious act done with intent to endanger the safety of any person travelling upon a railroad, or in any aircraft, vessel or other means of transportation.

29. Piracy; mutiny or revolt on board an aircraft or vessel against the authority of the captain or commander of such aircraft or vessel; any seizure or exercise of control, by force or violence or threat of force or violence, of an aircraft or vessel.

30. Offenses against laws (whether in the form of tax laws or other laws) prohibiting, restricting or controlling the traffic in, importation or exportation, possession, concealment, manufacture, production or use of:

- a. narcotic drugs, cannabis sativa-L, psychotropic drugs, cocaine and its derivatives;
- b. poisonous chemicals and substances injurious to health;
- c. firearms, other weapons, explosive and incendiary devices;

When violation of such laws causes the violator to be liable to criminal prosecution and imprisonment.

31. Unlawful obstruction of court proceedings or proceedings before governmental bodies or interference with an investigation of a violation of a criminal statute by the influencing, bribing, impeding, threatening, or injuring of any officer of the court, juror, witness, or duly authorized criminal investigator.

32. Unlawful abuse of official authority which results in deprivation of the life, liberty or property of any person.

33. Unlawful injury, intimidation or interference with voting or candidacy for public office, jury service, government employment, or the receipt or enjoyment of benefits provided by government agencies.

34. Attempts to commit, conspiracy to commit, or participation in, any of the offenses enumerated in the preceding paragraphs of this Schedule; accessory after the fact to the commission of any of the offenses enumerated in this Schedule.

35. Any offense of which one of the above listed offenses is a substantial element, even if, for purposes of jurisdiction of the United States Government, elements such as transporting, transportation, the use of the mails or interstate facilities are also included.

* * *

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION**

IN THE MATTER OF
THE APPLICATION OF
GALINA WEBER,

Petitioner,

v.

FOR DISCOVERY FROM
LAZAR S. FINKER, an
individual, RAISSA M.
FRENKEL, an individual,
STEVEN CHARLES
KOEGLER, an individual,
WILLIAM E. CHATTIN,
an individual, THEODO-
ROS J. KAVALIEROS,
an individual, AFRODITI
KAVALIEROS, an indi-
vidual, and IGOR V.
MAKAROV,¹ an individu-
al,

CASE No.:

3:07-mc-27-J-32MCR

Respondents. _____ /

¹ This Amended Petition is filed pursuant to the discussions during the hearing held on October 3, 2007. For the reasons addressed during the hearing, Respondent Makarov has been dismissed without prejudice and other items deleted from the original Petition [Dkt. 1].

AMENDED PETITION FOR DISCOVERY
IN AID OF FOREIGN PROCEEDINGS

(Filed Oct. 4, 2007)

Petitioner Galina Weber, pursuant to Title 28 United States Code Section 1782, respectfully moves the Court to enter an Order permitting discovery in aid of foreign and international legal proceedings currently pending in the Republic of Cyprus and Switzerland, from Respondents residing, or who may be found, within the Middle District of Florida, to wit: Lazar S. Finker, Raissa M. Frenkel, Steven Charles Koegler, William E. Chattin, Theodorus J. Kavalieros, and Afroditi Kavalieros.

I. Parties, Jurisdiction & Venue

1. Petitioner Galina Weber is a citizen of Switzerland and a resident of the Principality of Monaco and has been a shareholder of Itera Group, Ltd., a Cypriot corporation ("Itera Group"), since its incorporation in August 2004.

2. Respondents Lazar S. Finker, Raissa M. Frenkel, Steven Charles Koegler, William E. Chattin, Theodorus Kavalieros, Afroditi Kavalieros and Igor V. Makarov (collectively, the "Florida Shareholders") are also each shareholders of Itera Group as well as residents and/or may be found within the State of Florida.

3. On or about March 2006, Galina Weber filed suit in the District Court of Limassol, Cyprus against

Defendants: 1) Itera Group; 2) Igor V. Makarov ("Makarov"); and 3) Sweet Water Intervest Corporation of the British Virgin Islands, (a private company controlled by Makarov) ("Cypriot Action"). A true and correct copy of the Statement of Claim in the Cypriot Action is attached hereto as **Exhibit A**.

4. Although the Cypriot Action remains pending, on March 29, 2006 the Cypriot Court entered an interim judgment against Makarov preventing him from selling and/or transferring his thirty percent (30%) share of Itera Group. A true and correct copy of the Interim Judgment is attached hereto as **Exhibit B**.

5. In the Fall of 2006, criminal charges were filed against Galina Weber in Switzerland for allegedly embezzling Itera Group assets ("Swiss Action"). These allegations were based primarily on accusations and information provided by Makarov and Itera Group officials.

6. The Swiss Action remains pending against Galina Weber and a true and correct copy of the recently released criminal claim is attached hereto as **Exhibit C**.

7. The Florida Shareholders, excepting Makarov are not individually named parties to either the Cypriot or Swiss Actions.

8. Upon information and belief, each of the Florida Shareholders resides or may be found within the Middle District of Florida. A true and correct copy

of the Cypriot Certificate of Shareholders is attached hereto as **Exhibit D**.

9. This Court possesses exclusive jurisdiction over this matter pursuant to Title 28 United States Code Sections 1331 & 1782 as this application is for discovery, from witnesses located within the Middle District, to assist Galina Weber in her ongoing foreign cases in Cyprus and Switzerland.

10. Venue in the Middle District is appropriate pursuant to Title 28 United States Code Section 1782 because discovery is being sought from individuals located within this judicial district.

II. Factual Background

11. Itera Group is the international parent corporation for numerous subsidiaries worldwide, including Itera International Energy, Corporation, a Florida corporation with its principal address of business in Jacksonville, Florida.

12. Itera Group's assets are primarily related to the oil and gas market and are valued in excess of \$2.5 billion

13. Makarov is the chief executive officer of Itera Group, president of the Itera Group Board of Directors, and owner of the largest percentage of shares of any shareholder.

14. From 1995 until being effectively frozen out of the company in December 2005, Galina Weber was

continuously involved with Itera Group and its predecessor corporation, Itera Group, NV. She is a former employee and director of Itera Group subsidiaries.

15. Prior to the Itera Group's increase in capital shares in November 2005, Galina Weber held 437,142 shares of common stock, constituting a 14.5714 percent (14.5714%) ownership interest in Itera Group, making her the second largest shareholder. As discussed in more detail below, one issue being determined in the Cypriot Action is the claim of Galina Weber that such an increase in capital shares was illegal.

16. After the illegal increase in capital shares of Itera Group, Galina Weber's ownership interest was diluted from 14.5714 percent (14.5714%) to 4.8571 percent (4.8571%).

17. In filing the Cypriot Action against Itera Group, Galina Weber also alleged the Defendants conspired to improperly dilute her ownership interest by creating six million (6,000,000) new shares of Itera Group at an Itera Group Board meeting in November 2005.

18. The Swiss Action is grounded upon baseless complaints made by Makarov and the principals of Itera Group that Galina Weber, among other items, embezzled and/or improperly managed Itera Group assets.

19. Galina Weber, if convicted, faces multiple years of incarceration and tens of thousands of dollars in fines.

20. On July 27, 2006, fellow Itera Group shareholder Olga Krutova ("Krutova"), filed her own lawsuit against Defendant Itera Group in the District Court of Limassol, Cyprus.² Krutova prayed for entry of an Order: 1) establishing her right to a particular percentage of shares; and 2) dissolving Itera Group.

21. While the Krutova lawsuit remains pending, on February 16, 2007, the Krutova Court issued an interlocutory judgment prohibiting: 1) Itera Group from transferring any shares of the company belonging to Makarov and Sweet Water Intervest (among other companies), up to 245,214 shares; and 2) Itera Group from proceeding with any increase of its nominal and/or issued capital and/or to issue any shares. A true and correct copy of the Interlocutory Judgment is attached hereto as **Exhibit E**.

A. The \$80 Million Dividend declared by Itera Group

22. On or about January 28, 2005, the Itera Group Board of Directors approved payment of dividends to its shareholders in the total amount of \$80

² The Weber matter and the Krutova matter are not being heard by the same Limassol District Court.

million, to be disbursed in two separate tranches ("First and Second Tranche") of \$40 million each.

23. In February 2005, upon information and belief, the principals of Itera Group distributed the First Tranche to the shareholders in accordance with their respective ownership interest.

B. The Distribution of the First Tranche

24. In March 2005, Itera Group distributed the first half (\$40 million) of the \$80 million dividend approved in January 2005 ("First Tranche").

25. Upon information and belief, each shareholder in Itera Group, including Galina Weber, received a proportionate share of the First Tranche based on his or her ownership interest.

C. The Offers to Buy Galina Weber's Shares of Itera Group

26. In May 2005, Makarov offered to purchase all but two and one half percent (2.5%) of Galina Weber's fourteen and one half percent (14.5%) ownership interest for the purchase price of \$44.8 million. In other words Makarov sought to acquire from her an additional twelve percent (12%) ownership interest in Itera Group.

27. The \$44.8 million purchase price included both the sale of the shares as well as payment of

Galina Weber's proportionate share of the Second Tranche.

28. Galina Weber accepted Makarov's offer, and they agreed to consummate the transaction at the next Itera Group board meeting, to be held on May 28, 2005.

29. On May 28, 2005, at the Itera Group board meeting, Makarov refused to execute the agreement to purchase Galina Weber's shares.

30. Subsequently at the same meeting, several individual Itera Group shareholders then offered to purchase Galina Weber's twelve percent (12%) ownership interest.

31. Galina Weber accepted the individual shareholders' offer, and thereafter, a contract memorializing the agreement was prepared; however, the shareholders never performed under the contract (although they had agreed to buy and correspondingly signed a Transfer Notice) because Makarov pressured the shareholders not to execute the agreement.

32. Subsequently, representatives of Makarov repeatedly offered to purchase Galina Weber's shares at progressively lower and lower prices. Galina Weber rejected these offers.

D. The Distribution of the Second Tranche

33. Upon information and belief, the Itera Group Board of Directors approved the distribution of the Second Tranche at the May 28, 2005 meeting ("Second Tranche"). In other words, the remaining \$40 million from the total \$80 million approved dividend was distributed.

34. On information and belief, the Florida Shareholders devised a scheme to avoid tax liabilities associated with payment of the Second Tranche. This scheme involved Itera Group paying each Florida Shareholder his or her proportionate share of the Second Tranche through a shell company in the form of a loan, rather than as dividends, which would be taxable.

35. Galina Weber did not receive her proportionate share of the Second Tranche. Itera Group and Makarov favored all of the other Itera Group shareholders by paying them the full amounts they were due from the \$80 million dividend while withholding from Galina Weber most of what was due her. In fact, Galina Weber's distribution from the Second Tranche was proportionate to approximately a two and one half percent (2.5%) ownership interest rather than her full fourteen and one half percent (14.5%) ownership interest in Itera Group. The missing twelve percent (12%) would have entitled her to an additional \$4.8 million.

E. Dilution of Galina Weber's Shares

36. After breaching the agreements to buy Galina Weber's shares, on or about November 27, 2005, in an effort to dilute Galina Weber's entire ownership interest, Itera Group's Board of Directors voted to increase the number of authorized shares in Itera Group by six million (6,000,000) shares.

37. On information and belief, the remaining shareholders of Itera Group were permitted to purchase an amount of shares to enable them to maintain their overall percentage of ownership prior to the capital share increase. This purchase was funded by Itera Group and/or an affiliated company and not by the individual shareholders.

38. In contrast, Galina Weber would have had to fund any purchase of shares from her own personal funds with the knowledge that Itera Group and Makarov would continue to breach fiduciary duties owed to her and to otherwise violate her legal rights including further dilutions.

39. Four days later, on or about December 1, 2005, Itera Group offered to buy all of Galina Weber's shares at a reduced price. Galina Weber rejected this offer.

40. On or about February 22, 2006, the new Itera Group shares were issued, and Galina Weber's ownership interest was thereby diluted to only 4.86%.

41. Itera Group consists of a complex web of over 180 interrelated companies formed under the

laws of multiple jurisdictions, including the United States. Itera's financial dealings, books and records are kept as a mystery to shareholders and third parties by Makarov who is believed to mismanage and loot the companies for his own purposes and to the derogation of shareholders such as Galina Weber, who will not bow to his demands.

42. Itera USA, Inc. is headquartered in Jacksonville, Florida, as is Itera International Energy Corporation. Both companies are subsidiaries of the Itera Group and Jacksonville is often a site for Itera business and Board meetings.

43. Moreover, according to the Florida Department of State, Division of Corporations, there are eight (8) active Itera Group subsidiaries registered as Florida business entities. These include: 1) Itera USA, Inc.; 2) Itera International Energy LLC; 3) Itera International Energy Corporation; 4) Item Funds LLC; 5) Item CIS LLC; 6) Item Aviation LLC; 7) Itera Promotions Inc.; and 8) Itera Timberland & Development Strategies LLC.

III. Legal Analysis

A. The Statutory Requirements

Section 1782 of Title 28 of the United States Code authorizes a United States District Court, upon petition of an interested person, to order a person residing in the district to give testimony or produce documents for use in a foreign proceeding:

The District Court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusations. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court. . . . To the extent that the order does not provide otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure.

28 U.S.C. § 1782(a).

Galina Weber's Petition satisfies all of the statutory requirements found in section 1782 in order for this Court to enter an Order to permit her to obtain discovery for use in a foreign proceeding. Specifically, Galina Weber is an interested party in that she is the Claimant in an action in the District Court of Limassol, Cyprus (the "Cypriot Action") as well as a defendant in the Swiss Action. Secondly, the individuals from whom evidence is sought (the "Florida Shareholders") each reside, or may be found, within this District. Thirdly, Galina Weber seeks certain documents in the possession of the Florida Shareholders

to be produced in support of her claim in the Cypriot Action and her defense in the Swiss Action. Thus all the statutory requirements are satisfied.

B. The *Intel* Factors

The United States Supreme Court interpreted section 1782 as having a broad application. *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 259 (2004). In determining that section 1782 authorizes a federal district court to provide discovery assistance, the Supreme Court specifically rejected the multiple limitations Intel attempted to inject into the interpretation of the statute. *Intel*, 542 U.S. at 256. Rather the Supreme Court adopted a broad and liberal interpretation of the statute and provided guidelines for future application of the statute by federal district courts. *Id.*

Following the Supreme Court's guidance, the United States Court of Appeals for the Eleventh Circuit emphasized that "[t]he purpose of Section 1782 is to liberalize the assistance given to foreign and international tribunals." *In re Patricio Clerici*, WL840327 (11th Cir. March 21, 2007).

In *Clerici*, the Eleventh Circuit encapsulated the factors identified by the Supreme Court that a district court should evaluate in determining whether a section 1782 petition should be granted as follows:

- (i) whether the person from whom discovery is sought is a participant in the foreign proceeding;

(ii) the nature of the foreign tribunal, the character of the proceedings underway, and the receptivity of the foreign court to United States judicial assistance;

(iii) whether the petition attempts to circumvent foreign discovery restrictions or procedures; and

(iv) whether the request is otherwise unduly intrusive or burdensome.

Clerici, WL840327.

As discussed in more detail below, the instant Petition satisfies the requirements of the statute in all respects, as well as the *Intel* factors, and should thus be granted in its entirety.

1. Parties to the Foreign Proceeding

If the person from whom discovery is sought is a party to the underlying foreign proceeding, this fact weighs against granting a section 1782 petition. See *Clerici*, WL 840327. The reasoning is that the foreign court likely has jurisdiction over the parties to the underlying action, so it can simply order the production of evidence without external assistance. *Intel*, 542 U.S. at 264. On the other hand, when discovery is sought from a non-party located outside the foreign court's jurisdiction and in the United States, section 1782 may assist the foreign court and/or the named parties in obtaining such evidence. *Id.*

In the present Petition, the parties to the Cypriot Action are Galina Weber, Itera Group, Ltd. ("Itera Group"), Makarov, and Sweet Water Intervest Corporation of British Virgin Islands. The parties to the Swiss Action include Galina Weber and the government of Switzerland. None of the Florida Shareholders, excepting Makarov, are individually named in either the Cypriot Action or the Swiss Action. While Makarov is a named party in the Cypriot action, he is not a party in the Swiss criminal action. Because the majority of the persons from whom discovery is sought are not a party to either Action, and because neither the Cypriot court nor the Swiss court possess jurisdiction over any of the Florida Shareholders, excepting Makarov, this factor weighs in favor of granting Galina Weber's petition.

2. Cypriot Courts & Procedures

The Supreme Court has implied that there is a presumption in favor of assuming that a foreign court will be receptive to American judicial assistance. See *Intel*, 542 U.S. at 261. In holding that there is no requirement for the evidence obtained to be discoverable in the foreign proceeding, the Court noted that a foreign court might welcome evidence obtained under section 1782 even when it would not have been otherwise obtainable under the foreign court's rules. *Id.* at 261-262. Similarly, the Eleventh Circuit reasoned in *Clerici* that because there was no reason to suggest that the foreign court would not be receptive to evidence obtained under section 1782, the third and

fourth *Intel* factors weighed in favor of granting the section 1782 petition.

The Cypriot Action is currently pending in the District Court of Limassol, a court of first instance in Cyprus that possesses jurisdiction to hear and determine civil actions. The Cypriot judicial system is based on English common law, as is the American judicial system. Specifically, the Cypriot Constitution grants each individual the fundamental right "to present his case before the court and to have sufficient time necessary for its preparation; [and] to adduce or cause to be adduced his evidence and to examine witnesses according to law." Const. of the Republic of Cyprus. Part 2, art. 30, §3.

Because the Cypriot and American judicial systems are based on similar principles, there is no reason to believe that the present petition is an attempt to circumvent Cypriot discoverability rules. Likewise, there is no reason to believe that the District Court of Limassol would not be receptive to judicial assistance from the United States, a nation with a similar legal system.

3. Swiss Courts & Procedures

Switzerland is a democratic country subscribing to most of the ideals with which the United States is identified. While the Swiss legal system is based on civil law, rather than on common law, criminal defendants are afforded many of the same substantive and procedural guarantees they would enjoy in the United

States. For example, criminal defendants in Switzerland benefit from the presumption of innocence, right of habeas corpus, speedy trial, right to counsel, right to appeal, and "the opportunity to exercise [his or her] means of defense." *See* Fed. Const. of the Swiss Confederation. Title 1, arts. 29-32.

However, criminal procedure differs in Switzerland in that there is no trial by jury, and discovery is completed by an investigating magistrate before bringing formal charges. The matter will then be adjudicated by the investigating magistrate based on evidence obtained during the discovery period and on oral arguments at trial. Switzerland openly accepts assistance in criminal matters from foreign judicial authorities such as the United States District Courts.

In the present Petition, Galina Weber seeks compulsion of documents which may aid her criminal defense in the Swiss Action. Pursuant to Swiss law, a crucial aspect in establishing Galina Weber's innocence is proving that Itera Group was indebted to her because it never paid her the full amount of the Second Tranche. Itera Group now denies the Second Tranche was distributed when in fact the monies were transferred to the other shareholders. In other words, Galina Weber asserts that Itera Group owed her \$4.8 million for the Second Tranche for twelve

percent (12%) out of her 14.5714%,³ and that she was never paid this sum whereas other shareholders were paid their entire sums. Galina Weber needs the documents in the Florida Shareholders' possession or control tending to demonstrate that they received their full shares of the Second Tranche. Moreover, because the Swiss Action is currently in the investigative discovery phase, it is vital to Galina Weber's defense that she timely provides the Magistrate with these documents as evidence of her innocence. Galina Weber, if convicted, faces multiple years of incarceration and tens of thousands of dollars in fines.

4. The Information Sought

Galina Weber seeks the production of documents in the Florida Shareholders' ownership, possession, or control which proves that the \$40 million Second Tranche of dividends declared in January 2005 was distributed to them in amounts proportionate to their respective ownership interests in Itera Group. This request is directly relevant to Galina Weber's underlying Cypriot Action, in which she has claimed dilution of her ownership interest in Itera Group, as well as that she never received distribution of her full share of the Second Tranche. The defendants in the Cypriot

³ Galina Weber did receive approximately a portion of the Second Tranche; however, that distribution equaled only 2.5% of Galina Weber's total shares.

Action, as well as in interviews with government officials in the Swiss Action, deny that the Second Tranche was ever distributed. Galina Weber has a reasonable belief otherwise and she seeks further evidence to prove this critical element in the Cypriot and Swiss Actions.

Moreover, Galina Weber believes Makarov conspired with the Itera Group Board of Directors to dilute Galina Weber of her rightful percentage of ownership in Itero Group. Specifically, Makarov desired to increase the share capital because Makarov wanted to dilute Galina Weber and put further pressure on the value of Galina Weber's shares. The Itera Group Board of Directors followed Makarov's lead because they were dependent upon him funding their respective share increases so they would not be diluted. Moreover, the Itera Group Board of Directors had conspired with Makarov in shielding the Second Tranche and thus had little choice but to continue in lock-step with him. Galina Weber possesses correspondence implying that the Florida Shareholders may have received their full distribution from the Second Tranche under the guise of either a loan, proceeds from the sale of shares, a transfer of shares, or other disguised method of payment to avoid tax liability. As a result, it is likely that the Florida Shareholders have in their possession, ownership, or control documents proving that they received their full share of the Second Tranche.

C. The Subpoenas

In order to support her position in both the Cypriot and Swiss Actions, Galina Weber intends to serve each of the Florida Shareholders with a request for production of documents in accordance with the Federal Rules of Civil Procedure. *See* 28 U.S.C. § 1782(a). A sample copy of a proposed subpoena and request for production, which were served on the respondents, is attached hereto as **Exhibit F**.

IV. Conclusion

For the foregoing reasons, Petitioner, Galina Weber, seeks documentation of any transaction which may in fact have disguised distribution of the full Second Tranche. Because such documentation is likely to be in the possession, ownership, or control of the Florida Shareholders, each of whom resides within the Middle District of Florida, Petitioner respectfully petitions this court for entry of an Order granting the Amended Petition compelling Respondents to comply with the discovery requests that have been served; and allowing further follow-up documentary discovery based on information obtained through this proceeding.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 4, 2007, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to the following:

Charles B. Lembcke, P.A.

1300 Riverplace Boulevard

Suite 605

Jacksonville, Florida 32207-9018

cbl@cblaw.com

App. 141

/s/ Daniel K. Bean
Attorney

EXHIBIT A

SCALE: OVER CY•1.000.000

IN THE DISTRICT
COURT OF LIMASSOL

BETWEEN:

Action No. /2006

Galina Weber, of Monaco

Plaintiff

and

1. Itera Group Ltd. of Limassol
2. Igor V. Makarov, of Limassol
3. Sweet Water Intervest Corp. of
British Virgin Islands

Defendants

STATEMENT OF CLAIM

1. The Plaintiff was at all material times the holder of 437.142 ordinary shares in the share capital of Defendant 1 which represents 14.571% of the issued share capital of Defendant 1, which she acquired on/or about 20.08.04.
2. Defendant 1 is a limited liability company registered in Limassol and it is the holding company of the ITERA Group of Companies the main activities of which, relate to the oil and gas market and consists of

more than 150 subsidiary companies of total value more than \$USA 2.5 billions.

3. Defendant 2 is the Chief Executive Officer and the President of the Board of Directors of Defendant 1 and at all material times held 915.00 shares representing 30.5% of the issued capital of Defendant 1. At the same time Defendant 2 exercised control over all the rest of the shareholders except the Plaintiff, who altogether, including Defendant 2, held 85.4286% of the capital of Defendant 1 and almost all of these shareholders were employees of the subsidiaries of Defendant 1.
4. Defendant 3 is a company registered in the British Virgin Islands, **which is owned and/or controlled by Defendant 2.**
5. On or about May 2005 Defendant 2 made an offer for the purchase of 360.000 shares which were held by the Plaintiff, which represented 12% of the issued share capital of Defendant 1, at the price of \$USA 40.000.000.
6. The Plaintiff accepted the offer despite the fact that it was much lower than the value of her share capital due to the statements by Defendant 2 and/or his agents that in the event she rejected the offer Defendant 2 would make sure that the management of the activities of Defendant 1 would be conducted in such a way so that the participation of the Plaintiff in Defendant I would loose [sic] all value and her percentage

participation in Defendant 1 would decrease, by increasing the share capital of Defendant 1, to which she could not participate.

7. On or about 28.05.05 after extensive negotiations **Plaintiff** delivered to the **Defendant 2** a draft sale and purchase agreement between her and the **Defendant 2** for the purchase of 12% of the share capital of Defendant 1 for \$USA 44.800.000 which included the amount of 4.800.000 of unpaid dividends. Defendant 2 undertook to secure the waiver of the pre-emption rights of the rest of the shareholders through the control he exercised upon them.
8. Despite the above, when, on or about 28.05.05, the matter was discussed at the General Meeting of Defendant 1, Defendant 2 expressed his decision not to proceed with the purchase of the 12% of the shares of the Plaintiff with the obvious intention to use his control to decrease further the price he was willing to pay for the 12% percentage and to force the Plaintiff to sell at a much lower price.
9. Further to the refusal of Defendant 2 to purchase the percentage of the Plaintiff the rest of the shareholders expressed their interest to **acquire** the 12% of the shares at the price of \$USA 44.800.000 through financing from the capital of the

ITERA Group of Companies and alternatively with their own funds proportionately.

10. Despite the above, the shareholders never paid their proportionate part in the purchase price, obviously due to the influence exercised by Defendant 2, letting the Plaintiff to understand that there was no other choice than (?) to sell to Defendant 2 at the price he would determine.
11. At the same time Defendant 2 made sure that the Plaintiff was informed and/or he communicated to her through the Secretary of Defendants 1 that any sale of her shares to a third party would not be allowed and that the directors would refuse to register any transfer of shares to a third party.
12. On or about 27.11.2005 at an Extraordinary General Meeting of Defendant 1 it was proposed and approved that the authorised share capital be increased from \$USA 30.000 to \$USA 90.000 by creating 6.000.000 additional shares of value \$USA 0.01 per share. In addition, it was decided that theses [sic] additional shares be offered at a premium of \$USA 19.99 per share. **The Plaintiff claims that this decision constituted the materialisation of the threat against her by Defendant 2, that if she did not sell the 12% of the share capital of Defendant 1 which belonged to her, at the price he would**

fix, he would proceed with the shrinking of the share participation of the Plaintiff by a capital increase to which she could not participate. In addition, the Plaintiff claims that the further aim of Defendant 2 was to sell the difference between the initial percentage participation of the Plaintiff and her percentage participation after the increase of the capital to a third investor and to appropriate the amount exchanged.

13. On or about 08/12/05 the Plaintiff received an offer of the Defendant 2, that the Defendant 3, which is a company owned and/or controlled by him, would purchase the 12% of the share capital of the Plaintiff for the total amount of \$USA 35.000.000, i.e. by \$USA 9.800.000 less than the price he offered her a few months earlier. The Plaintiff claims that this movement by Defendant 2 was a last warning for her to sell her share, otherwise her share would shrink by the capital increase.
14. Following this, at a meeting of the Board of Directors of Defendant 1 it was decided by the Directors on or about 16/12/2005 to proceed with a rights issue on the basis of two ordinary shares of \$USA 0.01 per share for every share already held by each existing shareholder at the participation price of \$USA 20 per share.

15. The Plaintiff alleges that Defendant 1 at that time had no need for further capital for the purposes of its business.
16. The Plaintiff further states that even if Defendant 1 needed further capital, the true intention of Defendant 1 and/or Defendant 2 was to decrease in an oppressive manner the participation interests of the Plaintiff both in percentage and price.

PARTICULARS

- (1) The price per share, set by Defendant 2 and Defendant 3, namely of about \$USA 100 through their offers (which is at a price much lower than [sic] the actual price) is certainly higher than [sic] the \$USA 20 as decided by the General Meeting.
 - (2) In order to receive \$USA 120.000.000 Defendant I could have issued 1.200.000 shares of \$USA 100 each instead of 6.000.000 of \$USA 20 each.
 - (3) If the above procedure was followed the interest of the Plaintiff in percentage would have slightly decreased and the value of her shares even slightly.
17. On or about 19/12/05 the Plaintiff received, **after the decision of the Board of Directors dated 16/12/05, an invitation by Defendant 1 to participate by acquiring 874.284 additional ordinary**

shares of 0.01 cent each which were in proportion to her share by the capital increase, for the total value of \$USA 20 per share.

18. The Plaintiff did not participate as described above because she was ~~unable~~ not willing to collect the required amount due to the recent development and in addition it was made clear to her that in the event she did not sell her shares to Defendant 2 for the amount he demanded, her participation in **Defendant 1** would have no value and therefore it would have not been prudent to invest in further capital.
19. Almost every shareholder of Defendant 1, including Defendant 2, participated in the increase of the share capital of Defendant 1, **with money they acquired from the Itera Group.** The 874.284 shares which were not acquired by the Plaintiff, were distributed amongst with other shares to Defendant 3, **which became a shareholder of Defendant 1 by a very recent transfer of shares to it (?) her (on or about 31/1/06) of 1% from by the Mr. Valery Orchertsov, a shareholder, which was under the control and influence of Defendant 2.** Defendant 3 acquired 1.324.284 shares in total, comprising a percentage equal to 14.71% of the capital of Defendant 1. The issue and distribution of the shares to the existing shareholders **amongst which** also was Defendant 3 took place on/or about and/or

by the 7th of February 2006. **The Plaintiff claims that this way Defendant 2 acquired additional share capital in Defendant 1, through Defendant 3, for the price of \$USA 20 per share, whereas his initial offer to purchase 12% of the share capital of the Plaintiff equalled to about \$USA 100 per share. And Defendant 1 through Defendant 3 finally sold 25% plus 1 share for 450'000'000 \$USA or 200 \$USD per share.**

20. On or about 27/2/2006 Defendant 3 sent a letter to every shareholder including the Plaintiff, by which they notified their intention to sell 720.000 shares for \$USA 93 each for the amount of \$USA 66.260.000 within 30 days and on or about 01/03/2006 Defendant 3 sent a similar letter to every shareholder including the Plaintiff, for the sale this time of 360.000 shares and again for \$USA 93 each for the total amount of \$USA 33.480.000. **By this way, the Plaintiff claims, Defendant 3 and/or Defendant 2 would acquire profit against her for at least \$USA 73 (more probably 180 \$USA) per share from the shares they acquired through the illegal increase of the capital against the Plaintiff.**
21. On or about 29/03/2006 the Plaintiff filed the Action with the above title and number and obtained an interim order which prohibited, inter alia, the transfer of the above

shares of Defendant 3 to a third party and the shares of Defendant 2 in Defendant 1 were burdened **in order to meet a possible judgement the Plaintiff would secure against him for compensation.** Following the dismissal [sic] of the first of the abovementioned interim orders on or about 04/05/2006 Defendant 3 transferred 360.000 from ~~her~~ its (?) shares to Eskadi Investments Ltd and 720.000 of her its (?) shares to Sun Energy Ltd both from St Helier Jersey Channel Islands, **making a mentioned above a [sic] profit of at least \$USA 73 (more probably 180 \$USA) per share against the Plaintiff.**

22. The Plaintiff alleges that the above transfer was conducted outside the time limit and against the provisions of the Memorandum and Articles of Association of Defendant 1.
23. The Plaintiff claims that the actions by Defendant 1 and Defendant 2 caused her damage since her participating percentage in Defendant 1 decreased from 14.5714% to 4.86% and given the value of Defendant 1, she suffered damages of more than \$USA 250.000.000.
24. The Plaintiff claims that the decision of the General Meeting dated 27/11/2005 is illegal, as it was taken under abusive circumstances for a purpose other than the one stated that the increase was for, and must be cancelled, in order to restore the

participation of every party in the previous condition.

25. The Plaintiff claims further that the decision of the Board of Directors of Defendant 1 dated 16/12/2005 for the issue and distribution of shares to the shareholders on the basis of two (2) ordinary shares for \$USA 0.01 each **for every share held by every shareholder for the participating price of \$USA 20 per share, was taken under** circumstances which constitute conspiracy between Defendant 1 and/or Defendant 2 and/or Defendant 3, with the only purpose the acquisition of part of the share participation of the Plaintiff for the benefit of Defendant 2 and/or 3.

Particulars of Illegality, Oppression and Conspiracy

- (1) The financing the existing shareholders had to acquire the new shares came from Defendant 1 **and/or its subsidiaries and most probably it was channelled through accounts of Defendant 3** during February up to and including April 2006.
- (2) Despite the fact, as it derives from the above, that some of the shareholders had not received the relevant financing and had not paid the price for the shares they acquired on 7th February 2006 **(and they received it much**

later, in April 2006), Defendant 1 issued and distributed to them shares.

- (3) Plaintiff alleges that Defendant 1 never received any money for the capital increase on its accounts from the individual shareholders and in case it really received money, the amount of appr. 45 mio \$USA was used three times to reflect payment of the capital increase amounts by the individual shareholders and that those appr. 45 mio USD were monies of Defendant 1 itself.
- (4) The Plaintiff claims that the issue and distribution of the shares to the shareholders who had not yet received the loan form [sic] Defendant 3 occurred without them having paid the consideration required.
- (5) On or about 17 February 2006 at a General Meeting of Defendant 1 its Memorandum and Articles were amended, so that when a shareholder transfers his shares to an existing shareholder it would no longer be necessary to follow the procedure of waiver of pre-emption rights of the rest of the shareholders. The Plaintiff, through her proxy, voted against the said amendment.
- (6) After the dismissal of the interim order issued in this action, Defendant 3, as mentioned in paragraph 21 above,

transferred on **or about 11 or 12/5/06** 360.000 and 720.000 of its shares to Eskadi Investment Ltd and Sun Energy Ltd.

- (7) From February 2006 until May 2006, almost every shareholder who acquired new shares carried out transfers to **Defendant 3 only** ~~other existing shareholders~~, without sending an offering letter to the rest of the shareholders, based on the provisions of the amended Memorandum and Articles. As a result, many of the shareholders who managed, following the increase of the share capital to maintain their shareholding participation in Defendant 1, ended up, after the new internal transfers loosing [sic] a large part of their shareholding participation. The shares that were transferred during this period, ended up to Defendant 3 and from Defendant 3 to Eskadi Investment Ltd and Sun Energy Ltd.
- (8) It derives that these shareholders did not actually pay anything or the amount in proportion to the new shares they acquired, and therefore they should have returned them and/or it was pre-planned to return them. The voting in favour of the decision dated 27/11/05, which lead to the decrease of the shareholding participation of many of the rest of the

shareholders (and not just the Plaintiff's) occurred obviously due to the undue Influence over them by Defendant 2 and/or as receipt of other consideration, with the ultimate purpose of drastically decreasing the percentage of the Plaintiff.

26. **In addition the Plaintiff claims that the issue and granting of shares that occurred on or about 7/2/06, which was based on the capital increase, is illegal and void due to the fact that it was conducted through financing for the acquisition of the shares from the capital of Defendant 1 and/or its subsidiaries.**
27. On or about 4/5/2006 the following shareholders transferred their shares to Defendant 3 as follows:
 1. Gennady V. Skidanov transferred 90.000 out of his 180.000 shares.
 2. Afroditi Kavalierou [sic] and Theodoros Kavalieros transferred 90.000 out of their **225.429** shares.
 3. Vladimir P. Petrov transferred 45.000 out of his 90.000 shares
 4. Gennady I. Bellousov transferred 45.000 out of his 135.000 shares.
 5. Tatiana R. Korotkova transferred 90.000 out of her 135.000 shares.

6. Vladimir R. Kudryashov transferred 30.000 out of his 45.000 shares.
7. Vladimir Kuschenko 30.000 out of his 45.000 shares.
8. Vyatcheslav M. Nazarov 45.000 out of his 135.000 shares.
9. Yury D Pianykh 30.000 out of his 45.000 shares.
10. Larisa M. Frenkel 135.000 out of her 225.429 shares.
11. Igor Nazarov transferred 30.000 out of his 45.000 shares.
12. Lazar S. Finker transferred 90.000 out of his 225.429 shares.
13. Raissa M. Frenkel transferred 90.000 out of her 225.429 shares.
14. Ruen Finance Corp. transferred 150.000 out of his 315.000 shares.
15. Steven Charles Koegler transferred 90.000 out of his 225.429 shares.
16. Steven Sisselman transferred 90.000 out of his 225.429 shares.
17. Due Time Resources Inc. transferred 150.000 out of their 315.000 shares.
18. Valery L. Markotenko transferred 180.000 out of his 360.000 shares.
19. Valery G. Otchertsov transferred 90.000 out of his 540.000 shares.

- 20. Victor D. Sehvets transferred 180.000 out of his 540.000 shares.
- 21. William E. Chattin transferred 18.000 out of his 36.000 shares.
- 22. Igor Nazarov transferred 30.000 out of his 45.000 shares.

This way Defendant 3 was on/or about 5/5/06 shareholder of 3.112.284 shares.

- 28. On or about 12/05/2006 Defendant 3 sent to the Plaintiff a letter of offer for 9000 of ~~her~~ its (?) shares for the price of \$USA100 by virtue of to article 34 of the Memorandum and by a second letter of the same date made an offer for 450.000 of its shares for \$USA 100.
- 29. On or about 18/05/06 Defendant 3 transferred in addition 360.000 of its shares to Eskadi Investment Ltd and in addition 900.000 to Sun Energy Ltd, **without following the procedure of waiver of pre-emption rights of the rest of the shareholders, by virtue of the of the amendment of the Memorandum mentioned in paragraph 25(a) above.**

Based on the above, Defendant 3 was the holder, on 18/05/06 of 772284 shares of the share capital of Defendant 1, Eskadi Investment Ltd was the holder of 720.000 shares of the share capital of Defendant 1 and Sun Energy Ltd was the holder of 1.620.000 shares of the share capital of Defendant 1.

30. **At a later stage on/or about 20/6/06 Defendant 3 transferred 1.000 shares to Elsamex Enterprises Ltd, on/or about 26/6/06 they transferred 450.000 shares to Troika Dialog Investments Ltd and at some stage they transferred 90.000 shares to Vernon Services Ltd, and as a result Defendant 3 was left with 223.284 shares.**
31. **On or about 27/7/06 one of the shareholders, Olga Krutova filed an application for liquidation against Defendant 1 of which the Plaintiff received knowledge a few weeks later. By its application the said Olga Krutova adopted and totally confirmed her position of the Plaintiff as these were stated in the affidavits which supported the application for an interim order under this current action and in addition she revealed the following:**
 - (1) **Indeed, the plan was for all the shareholders apart from the Plaintiff to acquire in proportion the shares from the capital increase, through the financing of the Itera Group. This way the share participation of the Plaintiff would shrink and the new share in proportion to her would be acquired from Defendant 3 for \$USA 20 in order to be sold later to third investors at a much higher price.**

- (2) Because Olga Krutova expressed her intention to sell her shares directly to third interested investors at the price of \$USA 298 per share, Defendant 2 threatened her that the Itera Group would not finance her participation in the increase of the share capital of the Defendant, since the probable sale of her shares to third investors undermined his own plans.
- (3) This way finally the participation of Krutova was not financed and her share capital shrunk from 3,00% to 1%, despite the fact that Srutova received a notice from the Secretary that she was already been granted with 180.000.
- 32. Based on the above it is extracted that Defendant 2 in collusion with Defendant 3 obtained stealthily 9.7114% of the share capital which belonged to the Plaintiff and sold it to third investors depriving the Plaintiff of a property asset worth appr. \$USA 250.000.000 though the illegal channeling of the capital increase described above.
- 33. Because of the above actions of the Defendants was forced to ask for her lawyers' services and thus she will bare [sic] upon the amount of the costs ordered, V.A.T. of 15%,

an amount which she claims from the Defendants. The V.A.T. registry number of the Lawyers of the Plaintiff is 30005088W.

AND THE PLAINTIFF CLAIMS:

- A. A Court Declaration that the decision of the General Meeting of Defendant 1 dated 27/11/2005 by which it was decided to increase the share capital of Defendant 1 from USA \$ 30.000 to USA \$ 90.000 by creating 6.000.000 new ordinary shares of USA \$ 0.01 each and for them to be offered to the members of Defendant 1 for USA \$ 20, is void ab initio and of no legal consequence.
- B. A Court Order by which to declare the above mentioned decision of the General Meeting of Defendant 1 void ab initio and of no legal consequence.
- C. A Court Declaration that the Decision of the Board of Directors of Defendant 1 dated 16/12/2005 to grant rights to acquire shares in the proportion of 2 ordinary shares of USA \$ 0.01 each for every share held already by each shareholder for the price of USA \$ 20 for each share, is void and of no legal consequence.
- D. A Court Order invalidating the issue of the shares to the shareholders on or about February 2006 which was carried out through financing from funds of ITERA Group of Companies if any financing took place at

all. ~~Transfer of the Eskadi and Sun Energy~~
(?).

- E. A Court Order invalidating the transfer of shares by Defendant 3 to Eskadi Investments Ltd and Sun Energy of 360.000 and 720.000 shares respectively.
 - F.(?) Damages for the losses caused to the Plaintiff by the above illegal decision of the General Meeting of Defendant 1 due to breach of duty of faith and/or good faith of the Defendants towards the Plaintiff and/or for conspiracy between the Defendants to defraud and/or cause of damage and/or financial loss to the Plaintiff and/or for decrease of her shareholding in Defendant 1.
-

HANDED OVER

Cantonal Office for Investigations
Dr. Peter Hangartner
Examining Magistrate
for Economic Crime
Klosterhof 8a
9001 St. Gallen

St. Gallen, 23rd August 2006

Dear Mr Magistrate

In the matter

GASITERA Suisse AG
Fürstenlandstrasse 5
9013 St. Gallen

Represented by
Mr Christof Müller, legal counsel
Girtannerweg 5
9010 St. Gallen

As plaintiff

versus

Mr Urs Weber, legal counsel, lic. iur.
[Date Of Birth Omitted]
citizen of Oberuzwil SG
resident at:
[Home Address Omitted]

as Defendant 1

and

Mr Silvio Weber

[Date Of Birth Omitted]

citizen of Oberuzwil SG

resident at:

[Home Address Omitted]

as Defendant 2

and

Ms Galina Weber

[Date Of Birth Omitted]

citizen of Oberuzwil SG

resident at:

[Home Address Omitted]

as Defendant 3

and

possible other persons, unknown as of today.

I bring in the following

COMPLAINT

relating to

Embezzlement

pursuant to Art. 138 para. 1, Penal Code

**Qualified Embezzlement in the role of-
professional asset manager**

pursuant to Art. 138, point 2, Penal Code

**Multiple disloyal management
in the form of breach of trust**

pursuant to Art. 158, para. 1, Penal Code

**Multiple disloyal management
in the form of abuse of power of authority**
pursuant to Art. 158, para. 2, Penal Code

Attempted Coercion
pursuant to Art. 181, PC,
together with Art. 22 Penal Code

Attempted Fraud
pursuant to Art. 146, PC,
combined with Art. 22 Penal Code

Forgery of documents
pursuant to Art. 251 para. 1, Penal Code

**Obtaining false certification
by fraudulent means**
pursuant to Art. 253 Penal Code

Mismanagement
pursuant to Art. 165 point 1, Penal Code

Unauthorized financial intermediation
pursuant to Art. 36 MLA

as follows:

I. CHARGES

1. Criminal proceedings against the defendants are to be initiated.
2. Pursuant to Art. 144, para. 1, StP [Code of Criminal Procedure], the land registry office St. Gallen-Bruggen should block the land registry entry of plot no. 1296, Fürstenlandstrasse 5, 9000 St. Gallen ("Burg Waldegg") with immediate effect.

3. The bearer mortgage note no. 17424, referring to plot no. 1296, Fürstenlandstrasse 5, 9013 St. Gallen ("Burg Waldegg") in the amount of CHF 6'500'000.- is to be immediately sequestered from the defendants pursuant to Art. 141, StP in connection with Art. 146, para. lit. B, StP.
4. The property and all its moveables at Fürstenlandstrasse 5, 9000 St. Gallen ("Burg Waldegg") is to be seized and secured immediately pursuant to Art. 144, para. 1, StP, so that the defendants no longer have access to the land and the property.
5. Pursuant to Art. 138, StP, the passports of defendants 1 and 3 should be blocked or some other form of restriction of liberty chosen, if necessary, the defendants should be taken into custody due to the risk of escape and collusion pursuant to Art. 113, lit. a and b, StP.
6. Assets of the defendants in the amount of up to CHF 7'000'000.- are to be sequestered to warrant the enforcement of the plaintiff's claims pursuant to Art. 59, point 2, para. 3, PC and to secure the official and extra-official costs of the proceedings pursuant to Art. 142, StP.
7. The initiation of criminal proceedings is to be reported to the Bar Register of St. Gallen as well as the Money Laundering Control Authority in Berne and the self-regulating organization VQF in Zug for the assessment of the relevant administrative license and security requirements.

8. The defendants are to be found guilty of the offences committed and to be punished accordingly.
9. At the same time, the necessary evidence for the judgment of the civil action pursuant to Art. 45, para. 2, StP, is to be determined.
10. In addition the defendants should be obliged to reestablish the status quo ante with regard to the ownership position of GASITERA Suisse AG by rescinding the sale and purchase agreement and transferring the property no. 1296, Fürstenlandstrasse 5, 9000 St. Gallen ("Burg Waldegg") back to the plaintiff at the expense of the defendants.
11. If applicable, the frozen assets of the defendants in the minimum amount of CHF 6'500'000.- plus 5% interest since 8 June 2006 plus official and extra-official costs incurred should be collected and awarded to the plaintiff pursuant to Art. 60, PC.

The plaintiff reserves the right to file additional complaints as well as the quantification and substantiation of civil law claims once the procedure of taking evidence has been finalized.

Costs and damages are at the expense of the defendants.

All of the above on the following

GROUND

In violation of their duties and contrary to instructions, defendant 1 and 2 in their role as board members of the plaintiff agreed and carried out the sale of the property "Burg Waldegg" to defendant 3, wife and sister-in-law of defendant 1 and 2.

The net purchase price of "Burg Waldegg" was paid by the assignment of a prorated dividend claim calculated on a total dividend of USD 80'000'000.— that was set off against the purchase price to execute the sale.

Every defendant knew at any given time that no prorated dividend claim on USD 80,000,000 ever really existed and that therefore, it could not have been assigned either.

It is correct and has never been disputed by the plaintiff that a prorated dividend claim on a total of USD 40'000'000.— in the amount of USD 5'828'560.— arose for defendant 3; however, this claim had been duly paid long ago.

With great criminal energy and without any awareness of wrongdoing the defendants tried to construe a dividend claim in the same amount with the intent of unlawfully enriching themselves and thus damaging the assets of the plaintiff and the group by the amount of USD 5,828,560. —

To prove this fabricated claim, the defendants deliberately produced false documents, unlawfully handed over a bearer mortgage note to defendant 3 and later

even sold the property Burg Waldegg to her. All this with the intent to coerce the plaintiff or another group company to pay the fictitious dividend claim.

The defendants caused material financial damage to the plaintiff through these criminal acts. The removal of Burg Waldegg, its main asset, from the balance sheet without any corresponding compensation resulted in the plaintiff being insolvent at the present point in time.

II. FORMAL CHARGES

1. The undersigned is fully mandated by the plaintiff and is registered in the Bar Register of the Canton of St. Gallen.

Evidence: – Copy Power of
Attorney, dated 18
July 2006 (original
will be submitted
upon request) Annex 1

2. The plaintiff has been severely damaged by the criminal acts reproached to the defendants and is, therefore, directly affected in its interests protected by law. The plaintiff is consequently entitled to bring in criminal charges and at the same time assert its civil law rights pursuant to Art. 42, para. 1 of the Code of Criminal Procedure of St. Gallen [StP, sGS 962.1].
3. The plaintiff has been harmed by these criminal acts and is therefore entitled to lodge a complaint pursuant to Art 28, para. 1 of the Swiss Penal Code [PC, SR 311.0].

4. The sale and purchase agreement for the property no. 1296, Fürstenlandstrasse 5, 9000 St. Gallen ("Burg Waldegg") is dated 8 June 2006. On 4 July 2006, the plaintiff was informed of this transaction during a personal conversation with defendant 1. The plaintiff lodges a complaint for all elements of the offences described in the present statement of facts and thus complies with the three month term for lodging an application pursuant to Art 29, PC.
5. The criminal offences reproached to the defendants were committed in St. Gallen, where also the plot including the property is situated that was misappropriated by the defendants and where supposedly the deed, the bearer mortgage note no. 17424, is kept. Therefore, pursuant to Art 346, PC, the criminal investigation authorities of the Canton St. Gallen are responsible for the matter locally. Consequently, pursuant to Art. 11, lit. B, StP, the cantonal investigation authority is factually responsible.
6. Some of the documents submitted by the plaintiff are photocopies. In case their consistency with the original is disputed, the plaintiff is willing to submit the originals upon first request, if they are in its possession. For all other originals we request sequestration of the possessions of the defendants or other third parties involved.
7. Some of the documents submitted by the plaintiff are in English. In case there is a need for a German translation, the plaintiff is willing to have these translated at its own expense upon first request and to subsequently file the translations.

8. The plaintiff offers to provide all other files in its possession up on first request.
9. The plaintiff further submits written affidavits. In case the authenticity of the signatures is disputed, the plaintiff is willing to submit certified signatures of the relevant persons upon first request.
10. The witnesses nominated by the plaintiff that reside abroad agree – as far as they are known to the plaintiff – to make a statement, following prior arrangements and summons, through the representative of the plaintiff in St. Gallen; this, to avoid having to carry out hearings based on judicial aid requests. The plaintiff is prepared to submit a detailed list of addresses and contact information of all witnesses upon first request.
11. The plaintiff expressly releases defendant 1 from [sic] his duty to keep professional secrecy within the scope of these criminal proceedings pursuant to Art. 321, para. 1, PC combined with Art. 149, para. 2, StP and declares a clear disinterest in the request to seal all confiscated files and documents for the purpose of safeguarding its interests pursuant to Art. 150, StP.

III. STATEMENT OF FACTS

A. About the plaintiff

12. The plaintiff, company number CH-320.3.042.383-6 is domiciled at Fürstenlandstrasse 5 in 9013 St. Gallen ("Burg Waldegg").

Evidence: – Original certified
excerpt from the
commercial regis-
ter GASITERA
Suisse AG dated 8
August 2006

Annex 2

13. Since 18 July 2006, the only member of the board with sole signatory power is Dr. Peter Stocker.
14. The plaintiff is an affiliate of the ITERA group of companies, which is one of the biggest gas and oil manufacturers in Russia. The plaintiff is an affiliate of Itera Holdings B.V., Netherlands, which is evident from the register of shareholders of the plaintiff dated 10 May 2004. Itera Holdings B.V. is again held by Itera *Holdings* Limited in Cyprus that again is held by Itera *Group* Limited in Cyprus, the highest group company.

Evidence: – Copy organigram
of the main group
companies "Itera
Principal Compa-
nies and Func-
tions" dated 26
April 2006

Annex 3

App. 170

- Copy of Register of Shareholders
GASITERA Suisse AG, dated 10 May 2004 (majority shares not changed until today) Annex 4
- Original confirmation Itera Holdings B.V. dated 14 August 2006 in English and German translation including original excerpt from commercial register of the company Annex 5
- Original confirmation of Itera *Holdings* Limited dated 14 August 2006 Annex 6
- Original certified copy with apostile of the Certificate of Incorporation of Itera *Holdings* Limited dated 14 August 2006 Annex 7

App. 171

- Original certified copy of apostile of the Certificate of Registered Office of *Itera Holdings Limited* dated 14 August 2006 Annex 8
- Original certified copy with apostile of the Certificate of Shareholders of *Itera Holdings Limited* dated 14 August 2006 Annex 9
- Original certified copy with the apostile of the Certificate of Directors and Secretary of *Itera Holdings Limited* dated 14 August 2006 Annex 10
- Original confirmation of *Itera Group Limited* including a list of shareholders dated 14 August 2006 Annex 11

App. 172

- Original certified copy with apostile of the Certificate of Incorporation of *Itera Group* dated 14 August 2006 Annex 12
- Original certified copy with apostile of the Certificate of Registered Office of *Itera Group Limited* dated 14 August 2006 Annex 13
- Original certified copy with apostile of the Certificate of Shareholders of *Itera Group Limited* dated 14 August 2006 Annex 14
- Original certified copy with apostile of the Certificate of Directors and Secretary of *Itera Group Limited* dated 14 August 2006 Annex 15

15. The business purpose of the plaintiff is trade and commerce with any form of energy and goods of all kind, in particular with gas, as well as services in this area and know-how transfer,

it can establish affiliates nationally and internationally, and can hold shares in other companies at home and abroad, can buy, establish or lease other companies as well as buy, sell, keep, build on, lease and release properties and real estate.

Evidence: – Original certified
excerpt from the
commercial register GASITERA
Suisse AG dated 8
August 2006 Annex 2

B. About the Defendants

16. All the defendants mentioned by name are either related or related by marriage.
17. Defendants 1 and 2 are brothers. defendant 3 is the wife of defendant 1 and therefore, the sister-in-law of defendant 2.
18. Defendant 1 has a law office at Goethestrasse 61 that is listed in the telephone book as such. However, he is neither registered in the Bar Register of the Canton of St. Gallen nor is he a member of the St. Gallen or Swiss Bar Association.

Evidence: – Current telephone
book entry dated
19 August 2006
(www.directories.ch/weisseseiten/index.aspx) Annex 16

19. Defendant 2 is the owner of the company Weber Treuhand AG domiciled at Goethestrasse 61, 9008 St. Gallen.

Evidence: – Original certified
excerpt from the
commercial register
Weber Treu-
hand AG dated 8
August 2006

Annex 17

20. Until 17 July 2006 defendants 1 and 2 were fiduciary board members of the plaintiff.
21. There are no written mandate or employment contracts with defendants 1 and 2.
22. In addition, defendant 1 acted as the legal counsel for the plaintiff as well as the head of the Legal Team and Financial Committee for the entire ITERA group on a mandate basis and was dealing with commercial law issues. In this function, he had access to relevant information, on which important decisions were based; he also legally prepared and backed all group decisions.
23. Defendants 1 and 2 further acted as professional financial intermediaries. According to a telephone inquiry with the Money Laundering Control Authority, the company Weber Treuhand AG is a member of the self-regulating organization VQF and holds a professional license under the Money Laundering Act [MLA, SR 955.0] for the exercise of financial transactions. Based on the license of Weber

Treuhand defendants 1 and 2 are registered with the SRO VQF as the responsible persons.

24. Defendants 1 and 2, however, do not dispose of a license to act as financial intermediaries in their *own* names according to the same telephone inquiry with the Control Authority.

C. Regarding the Object and Facts of the Offence

25. The plaintiff was the owner of the plot and the property no. 1296, Fürstenlandstrasse 5, 9000 St. Gallen ("Burg Waldegg") until it was unlawfully sold on 8 June 2006.

Evidence: – Copy brochure
Burg Waldegg Annex 18

– Current Excerpt
from the land
register issuance

26. The plaintiff had considered a possible sale of the property for a long time; however, they were not conclusively sure about the demand and the pricing of such a special real estate offer.
27. They were therefore thinking about getting a valuation. With letter dated 6 July 2005, however, defendant 1 was expressly instructed not to take any further steps in the sales process and refrain from any sales negotiations. Defendant 1 was told that he would be informed on any decisions in the matter.

Evidence: – Copy of letter

ITERA

dated 6 July 2006 Annex 19

28. Defendant 1 acknowledged the receipt of these instructions in his email dated 27 July 2005 and stated:

"I am fully aware that we are not supposed to proceed with the sale of Burg Waldegg anymore [underlined by the plaintiff], but as I told you, the internet presentation and a similar brochure had already been started and were finalized."

Evidence: – Copy of Email

receipt from Mr

Urs Weber dated

27 July 2005

Annex 20

29. In his email dated 18 September 2005, defendant 1 again confirmed that the instruction of not continuing any sales negotiations was known to him and that he was complying with it.

"GASITERA Suisse AG: ... The sale of Moldkarton will be a zero deal for GASITERA Suisse, it is established as planned and proposed and the final result will largely depend on the purchase price of Burg Waldegg – but in spite of oral confirmations to initiate the sale from Moscow and restriction for me to continue the sale of Waldegg. Nothing has happened until today (except our

sales brochure and internet presentation – which has been withdrawn now)” [underlined by the plaintiff].

Evidence: – Copy Email from
Mr Urs Weber
dated 18 October
2005

Annex 21

30. Even so, on 21 September 2005 the fiduciary board members, defendants 1 and 2, established a bearer mortgage note no. 17424 in the amount of CHF 6'500'000.– on property no. 1296 (Burg Waldegg).

Evidence: – Copy Registration
for the formation
of a bearer mortgage note dated 21
September 2005

Annex 22

31. The defendants then handed the bearer mortgage note over to defendant 3 at a date that is as yet unknown, but surely falls in the time between the formation of the bearer mortgage note and *before* the sale of the property (i.e. between 21 September 2005 and 8 June 2006) This is evident from the wording in the sale and purchase agreement dated 8 June 2006, where the following statement is made, from which can be deducted that the deed was handed over before 8 June 2006:

“The bearer mortgage note no. 17424 previously served [underlined by plaintiff] as security for the dividend claim of the buyership [defendant 3] against the mother

company of ITERA Group Ltd., in Limasol, and remains [underlined by plaintiff] unmortgaged with the buyership [defendant 3] after conclusion of the sale and purchase agreement."

32. Defendants 1 and 2 handed the bearer mortgage note to defendant 3 without any written agreement or any acknowledgement of delivery. They thus handed over the deed willfully, without any conditions attached or compensation in return, nor were any corresponding warranty or security requirements agreed with defendant 3.
33. In the following we will show that there never was a prorated dividend claim on the amount of USD 80'000'000. – , but that only a prorated claim on the amount of USD 40'000'000. – had existed and been paid in proper form.
34. Despite the establishment of the bearer mortgage note and its remittance to defendant 3, defendant 1 never mentioned this new bearer mortgage note and the hand-over in his email dated 11 November 2005. Rather, he confirmed once again that he had been instructed to stop all activities relating to the sale of Burg Waldegg.

"Dear . . . But le [sic] met [sic] just add the following: AS VGO has instructed me to stop any activities in connection with the sale of Burg Waldegg [underlined by plaintiff], you will have to find such real estate brokers yourself."

Evidence: – Copy Email from
Mr Urs Weber
dated 11 November 2005

Annex 23

35. It is therefore established that also by 11 November 2005, no other instructions had been given that would have authorized the institution of the bearer mortgage note and its remittance to defendant 3 or that might have revoked the stop of all sales activities in general. To the contrary. The defendant made everyone believe that he was following the instructions that forbid all sales activities. However, he was doing the opposite with fraudulent intent and to the detriment of the plaintiff, the Dutch mother company, and consequently the whole group. It must also be assumed that he had in fact already handed the bearer mortgage note over in bad faith.
36. Later, the defendants obtained a professional opinion on the property from Knechtle AG (31 May 2006) and from Sproll & Ramseyer (16 May 2006) shortly before the actual sale. The latter opinion then even indicates Weber Treuhand AG as the owner of the property [!].

Evidence: – Copy Property
Assessment Sproll
& Ramseyer as
per 16 May 2006

Annex 24

- Copy Property
Assessment
Knechtle AG as
per 31 May 2006 Annex 25

37. In preparation of the change of ownership in the land registry deeds, defendants 1 and 2 each concluded an agreement with defendant 3 on 7 June 2006 and accepted an assignment declaration. These documents regulated the modalities of the purchase price and were taken over unchanged into the sale and purchase agreement and the change of ownership deeds dated 8 June 2006 the next day.

Evidence: – Copy Agreement
between GASI-
TERA Suisse AG
and Ms Galina
Weber dated 7
June 2006 Annex 26

- Copy Assignment
Declaration
between Ms
Galina Weber and
GASITERA Suisse
AG dated 7 June
2006 Annex 27

38. 8 June 2006, defendants 1 and 2 signed over the property Burg Waldegg to defendant 3 in their role as fiduciary board members of GASITERA Suisse AG.

Evidence: – Copy sale and purchase agreement and change of ownership registration between GASI-TERA Suisse AG and Ms Galina Weber dated 8 June 2006

Annex 28

39. The purchase price of the property, Burg Waldegg was set at CHF 5'300'000. – , at the same time defendant 3 as the buyership took over the debt on mortgage in the amount of CHF 1'200'000. – .
40. According to the agreement dated 7 June 2006 the settlement of the net price thus calculated to be CHF 4'100'000. – was then agreed as follows:

“As the owner of 14,5714% of all the shares of the Itera Group Ltd., Limassol, and based on the circumstance that the General Assembly Meetings of Itera Group Ltd. held on 21 January and 28 May 2005 decided that a total amount of 80'000'000 \$ would be paid out to its shareholders commensurate to their share ownerships, the buyer [Defendant 3] of the property Burg Waldegg, despite various reminders and complaints, never received full dividend payment of the second tranche.

The open claim of the buyer [Defendant 3] against Itera Group Ltd., the mother company of the seller of the property Burg Waldegg, GASITERA Suisse AG, per 30 May 2006 can therefore be outlined as follows:

Total dividend 2005 owed to the buyer:

14,5714% of 80 Mio. \$ = \$ 11'657'120.00

payments:

29. March 2005 1. tranche \$ 5'828'560.00

*03. June 2005 Part 2nd
 tranche \$ 1'028'560.00*

*remaining claim of the
buyer [Defendant 3] \$ 4'800'000.00*

plus interest accrued p.m..

For this reason the buyer [Defendant 3] assigned part of the open claim from the dividend of USD 4'800'000 (four million eight hundred thousand American Dollars) to the seller for the settlement of the remaining purchase price of Burg Waldegg, Fürstenlandstrasse 5, 9013 St. Gallen, in the amount of 4'100'000 CHF (four million one hundred thousand Swiss Francs) (total price 5'300'000 ./ 1'200'000 mortgage debt taken over) – see corresponding assignment declaration dated 7 June 2006."

Evidence: – Copy Agreement
between GASI-
TERA Suisse AG
and Ms Galina
Weber dated 7
June 2006

Annex 26

41. At the same time, pursuant to the agreement dated 7 June 2006 defendants 1 and 2 accepted the following provisions to the detriment of the plaintiff:

Point 1:

- Any cancellation of the contract at the cost of the seller [plaintiff]
- Acceptance of a contract penalty of CHF 6'500'000 in case the seller or a third party does not accord the full purchase price claim to the buyer, when the contract is cancelled.
- Continuance of the deed, i.e. the bearer mortgage note in the amount of CHF 6'500'000, in the possession of the buyer-ship, until the contract is cancelled under full reimbursement of the purchase price or until the contract penalty has been paid.

Point 2:

- Assumption of all costs, including investments and mortgage interest [!] by the seller [plaintiff].

- Right of the buyership [Defendant 3] to secure all these cost before the property is transferred back in the land registry.

Point 3:

- Continuance of the deed, i.e. the bearer mortgage note in the amount of CHF 6'500'000, in the possession of the buyership [Defendant 3], even if the contract is cancelled [!], until the full dividend claim in the amount of USD 4'800'000 plus interest accrued has been paid.

Evidence: – Copy Agreement
between GASI-
TERA Suisse AG
and Ms Galina
Weber dated 7
June 2006

Annex 26

42. In the assignment declaration dated 7 June 2006 defendants 1 and 2 also accepted the following stipulations:

“3. The assignor [Defendant 3] does not assume any liability for existence and enforceability of the claim of the debtor [Itera Group Ltd.].

Evidence: – Copy Assignment
Declaration
between Ms
Galina Weber and
GASITERA Suisse
AG dated 7 June
2006

Annex 27

43. Before entering into the agreement defendants 1 and 2 did not themselves check the claim for its legal and economic value nor its enforceability or collectibility. They also did not instruct a third party, such as a mandated lawyer or their auditor, to verify the assigned claim before accepting it. Therefore, no legal or financial opinion of a third party on existence, valuation and collectibility of the accepted dividend claim was requested, as this would have been expected from bona fide lawyers and trustees.
44. Accordingly, the defendants agreed the following in the sale and purchase agreement and change of ownership deeds dated 8 June 21 2006:

– Page 4 (purchase price):

“2b. by settling per the date of the change in the land registry entry with the dividend claim against the groups mother holding ITERA Group Ltd., in Limassol, owed the buyership [Defendant 3] and by assignment of the dividend claim of the buyership in the amount of USD 4’800’000 against the amount of the outstanding purchase price of Fr. 4’100’000 to the seller without any liability for existence and collectibility. [underlined by plaintiff]

– Page 4 (tax for change of ownership):

“3. The parties agree that the tax for the change of ownership, the fees for the deeds and land registry entries as well as

all other fees arising in connection with this transaction are to be borne by the seller [plaintiff]."

– Page 6 (deed):

"17. The bearer mortgage note no. 17424 previously served as security for the dividend claim of the buyership against the mother company of the seller ITERA Group Ltd., in Limassol, and remains unmortgaged with the buyership after conclusion of the sale and purchase agreement."

– Page 6 (designation of domicile for service):

"18. The buyership designates Weber Urs, Goethestrasse 61, 9008 St. Gallen as its representative in Switzerland with regard to the sales object (for the service of correspondence, invoices, etc.)."

Evidence: – Copy sale and purchase agreement and change of ownership registration between GASITERA Suisse AG and Ms Galina Weber dated 8 June 2006 Annex 28

D. About the Missing Proof of Legitimacy

45. On 4 July 2006, defendant 1 for the first time informed the plaintiff of the effected sale. He

was asked to explain this transaction and to revoke it, however, he refused to do so. Thereupon, the board of the plaintiff was newly constituted and its business and accounting documents were transferred to the new board.

Evidence: – Messrs. Dr. Peter
Stocker, Andreas
Neocleous and
Roy Sanders to be
invited
by the representa-
tive of
the plaintiff witnesses

46. The personal files and documents of the defendants in connection with their activities and claims remain in their possession.

Evidence: – Personal files and
documents of Ms
Galina Weber and
Messrs Urs and
Silvio Weber, in
particular: witnesses

- ☐ Files and minutes, documents and correspondence, accounting and account information, etc. regarding the following companies:
- . Gasitera Suisse AG, St. Gallen
 - . Itera Holdings B.V., Amsterdam
 - . Itera Holdings Ltd., Limassol
 - . Itera Group Ltd., Limassol
 - . Ample Enterprise Ltd.

- ☐ Personal files, documents and correspondence, accounting, tax and account information
- ☐ Agendas, time scheduler, travel documentation
- ☐ Computer and server
- ☐ Data back up tapes

47. The leading counsel for this case was mandated in the matter mid-July. With letter dated 3 August 2006 defendants 1 and 2 were offered the possibility of settling the issue amicably in writing.

Evidence: – Copy Letter in the name of the plaintiff to Mr Urs Weber dated 3 August 2006

– Copy Letter in the name of the plaintiff to Mr Silvio Weber dated 3 August 2006

48. On 8 August 2006, a meeting took place at Goethestrasse 61, at which defendant 1 and defendant 3 as well as the counsel leading the mandate accompanied by his colleague Felix Ludwig, legal counsel, lic. iur. HSG, were present. During this meeting defendant 1 explicitly confirmed the legal validity and maturity of the assigned dividend claim. When

confronted with the fact that on 21 January 2005 no General Assembly meeting took place – as mentioned in the agreement dated 7 June 2006 – defendant 1 repudiated this clearly, since he himself supposedly had been in Li-massol on that day. He vehemently tried to prove his statement by referring to a handwritten entry in his agenda. The defendants present then refused to disclose any documents – supposedly for tactical reasons in connection with the lawsuit. Further they pointed out that they had waited a long time to disclose “the big, unpublished matter” and were looking forward to a trial in Switzerland to do so; they added that the matter would still cause big waves.

Evidence: – Mr Felix Ludwig,
legal counsel, lic.
iur. HSG, Müller
Eckstein Rech-
tsanwälte, Staad witness

49. With letter dated 8 August 2006 defendants 1 and 3 were again requested to examine their legal position as well as the corresponding risks and to disclose the documents proving the alleged existing and mature dividend claim and the power of attorney for the sale to his spouse, so that the matter could be settled amicably.

Evidence: – Copy Letter in the
name of the plain-
tiff to Ms Galina
Weber and Mr Urs
Weber dated 8
August 2006

Annex 31

50. In an email dated 9 August 2006 defendant 1 replied that on 21 January there really was no General Assembly meeting and that it was a typing error. Correctly, the date should have been 29 January 2006 and the General Assembly meeting had been in Moscow.

Evidence: – Copy Email from
Mr Urs Weber
dated 9 August
2006

Annex 32

51. At this point it has to be re-emphasized that defendant 1 in the personal meeting on 8 August 2006 tried to prove that he had been in Limassol on that day to attend the alleged, recorded General Assembly meeting by presenting his agenda as evidence.
52. This can only lead to the conclusion that the defendants traced back the dates of 21 January 2005 and 28 May 2006 referred to in the agreement dated 7 June 2006, not as suggested from the meeting minutes themselves, but from the agenda of defendant 1 – but as now established those entries were wrong.
53. Defendant 1 was then telephonically asked by the legal counsel in charge of the mandate on 9 August 2006, whether he could provide the

meeting minutes of 29 January 2005. Defendant 1 refused to do so. In answer to the explicit question whether at least in these meeting minutes the total of USD 80'000'000 was apparent as figure, defendant 1 denied. Allegedly, it was "intentionally" left open. Apparently, no figures were mentioned in these minutes.

54. With letter dated 10 August 2006 all defendants were requested to fulfill their legal and contractual obligations for documenting the matter of the assigned dividend claim. Defendants 1 and 2 were further requested to prove and document the instructions for the authorized sale of Burg Waldegg by presenting the internal power of attorney.

Evidence: – Copy Letter in the
name of the
plaintiff to Ms
Galina Weber
dated 10 August
2006

Annex 33

– Copy Letter in the
name of the
plaintiff to Mr Urs
Weber dated 10
August 2006

Annex 34

– Copy Letter in the
name of the
plaintiff to Mr
Silvio Weber
dated 10 August
2006

Annex 35

55. Defendant 1 replied with email dated 15 August 2006 without proving the matter of the assigned claim or presenting the internal power of attorney for the sale. Surprisingly, in this email defendant 1 no longer talked about a dividend claim in connection with the General Assembly meeting of 29 January 2005, but referred to it as amounts to be paid out "as credit not subject to income tax or as trust or in any other comparable form" (page 2, end of second paragraph).

Evidence: – Copy Email from
Mr Urs Weber
dated 15 August
2006

Annex 36

56. With letter dated 16 August 2006, defendant 1 was again reminded of his legal and contractual obligations for documenting the matter of the assigned dividend claim and asked to comply with these requirements. At the same time he was again requested to prove and document the instructions for the authorized sale of Burg Waldegg by presenting the internal power of attorney. A last deadline for the delivery of these documents was set to expire 21 August 2006, 12 o'clock.

Evidence: – Copy Letter in the
name of the
plaintiff to Mr Urs
Weber dated 16
August 2006

Annex 37

57. On the same day, defendant 3 instructed defendant 1 to send a letter per email to the legal counsel in charge of the mandate, without, however, submitting any documentation for the matter of the assigned claim.

Evidence: – Copy email of Urs
Weber including
letter of Ms
Galina Weber
dated 16 August
2006

Annex 38

58. Defendant 1 then sent another email dated 17 August 2006 without proving the matter of the assigned claim or presenting the internal power of attorney for the sale.

Evidence: – Copy Email from
Mr Urs Weber
dated 17 August
2006

Annex 39

59. The defendants allowed the last deadline for presenting written evidence documenting the legitimacy of their actions or the deposit of the bearer mortgage note no. 17424, and that should have shown it willingness to settle the matter amicably, set for 21 August 2006, 12 o'clock, to lapse unheeded.
60. Defendant 2 did not personally participate in or designate a legal representation for the negotiations for an amicable settlement. Neither did defendants 1 and 3 notify the plaintiff of any legal representation.

E. About the Success of the Offence

61. A main asset was misappropriated from the possessions and the balance sheet of the plaintiff without any quid pro quo through the punishable acts of the defendants.
62. By reducing the assets without corresponding compensation in the amount of at least CHF 5'230'000 (book value of Burg Waldegg), today the balance sheet of the plaintiff is overindebted with an equity of CHF 1'354'124.22. Consequently, the plaintiff has to deposit the balance sheet and file for bankruptcy or take serious reorganization measures, unless Burg Waldegg is returned to its possession and balance sheet.

Evidence: – Provisional and
unaudited financial
statements for 2005 of GASI-
TERA Suisse AG
at the time of
remittance to Dr.
Peter Stocker

Annex 40

F. About the Missing Authorization for the Sale

63. As fiduciary board members of the mother company, Itera Holdings B.V. in Amsterdam, defendants 1 and 2 were obliged to follow instructions.
64. Defendant 1 and 2 never informed the mother company, Itera Holdings B.V. in Amsterdam,

authorized to issue these instructions, about the establishment of the bearer mortgage note, the corresponding remittance to defendant 3 or the planned sale to defendant 3. Likewise no internal power of attorney or authorization for the sale and the remittance of the bearer mortgage note to Ms Gana Weber was given to defendants 1 and 2.

Evidence: – Original confirmation Itera Holdings B.V. dated 14 August 2006 in English and German translation including original excerpt from commercial register of the company

Annex 5

65. Defendant 1, as legal counsel and member of the Board of the mother company Itera Holdings B.V., was also aware of the fact that important decisions and powers of attorney had to be recorded in minutes, in particular, if they concerned the survival of the daughter company [!]. In addition the agreement and assignment declaration dated both 7 June 2006 show the attempt of the defendants to give formal regularity to their unlawful acts. Following this formal regularity approach, they would consequently also have to be held liable for the internal instructions, i.e. the internal power of attorney that they would have needed for such activities.

- 66. No other instructions or authorizations of other group authorities were submitted as evidence.
- 67. Despite numerous requests the defendants have failed to submit an internal power of attorney, which would give and prove the authorization for concluding all objectively and subjectively important stipulations of the agreement and the assignment declaration dated both 7 June 2006.
- 68. Likewise such power of attorney does not exist for the sale and purchase agreement and change of ownership deed dated 8 June 2006 as well as the preceding institution of the bearer mortgage note and its remittance to defendant 3.

G. About the Proof of an Inexistent Dividend Claim

- 69. The assigned dividend claim is simply worthless, since it does not exist, let alone is it sufficiently definite, mature or enforceable.
- 70. It is correct and has never been disputed by the defendants that a prorated dividend claim on a total of USD 40'000'000. – in the amount of USD 5'828'560. – arose for defendant 3; however, this claim was paid in due form. Any claim beyond this is purely and simply inexistent.
- 71. The defendants agreed to set off the purchase prices of CHF 4'100'000 against the prorated dividend claim of 14,5714% on a total of USD

80'000'000. – and to deduct the payments already made; this resulted in an outstanding amount of USD 4'800'000. – . The difference between USD 4'800'000. – and CHF 4'100'000. – remained a claim of defendant 3.

72. In their agreement dated 7 June 2006, the defendants first maintained that the meeting minutes of the General Assemblies of ITERA Group Ltd. held on 21 January 2005 and 28 May 2005 would prove this dividend claim.

After remonstration the date was changed from 21 January 2005 to 29 January 2005. But this date does also not prove the allegation. On none of the three dates dividend decisions were taken, as confirmed by the corporate secretary of Itera Group Limited and as apparent from the meeting minutes. As already mentioned, nothing took place on 21 January 2005.

Evidence: – Original certified
copy with apos-
tille of confirma-
tion by Mr Andri
Papadopoulou of
Montrago Services
Limited dated 14
August 2006

Annex 41

App. 198

- Original certified copy with apostille of the minutes of the Board of Directors Meeting of Itera Group Limited held on 23 March 2005 and dated 14 August 2006 Annex 42
- Original certified copy with apostille of the minutes of the General Assembly meeting in English translation and Russian of 29 January 2005 Annex 43
- Original certified copy with apostille of the minutes of the General Assembly meeting in English of 28 May 2005 Annex 44

73. Again it should be pointed out that in the meeting minutes of 29 January 2005, both in the Russian original on the last page and in the English translation on the last page, it is mentioned that resolution was passed on a

planned method of distribution only, but not on actual figures – rather just zero amounts [!] were inserted. On the Russian original signatures are found for the decisions taken.

“9. To distribute out of the profits of the sale of Tiwoods/TNG the following amounts:

- ☐ *000.00 USD (50% of this amount until March 31, 2005 to the shareholders according to their percentage of shareholdship and 50% after additional checking either through a trust solution or something similar or as a second dividend stake according to their percentage of shareholdship within 14 days after the corresponding decision is taken*
- ☐ *000.00 USD for payment of premiums and/or bonuses according to list disclosed to the shareholders*
- ☐ *000.00 USD for various payments disclosed to the shareholders**

*Note: *Item 9 is made by Urs Weber.”*

Evidence: – Original certified copy with apostille of the minutes of the General Assembly meeting in English translation and Russian of 29 January 2005

74. For the sake of completeness it should be mentioned that no legal claim can be asserted nor can a maturity ensue nor can anything be assigned as a claim from a recorded and only planned method of distribution nor from zero-amounts mentioned in meeting minutes.
75. Furthermore, the planned method of distribution does not refer to an ordinary dividend claim from an ordinary yearly profit as always alleged by defendant 1, but according to the introduction to point 9 the distribution referred to the extraordinary profit resulting from the sale of Tiwoods/TNG.
76. The person taking the minutes obviously found it significant to note that the distribution method in "Point 9" was recorded upon express request of defendant 1.
77. From a legal point of view it is important to emphasize the difference between an interim dividend, which can be decided by the Board of Directors, and an ordinary dividend as "final dividend" that can only be resolved by the General Assembly.
78. "Final dividends" can only be paid and resolved from the ordinary profit that is determined by the finalized financial statements, such statements could not have been available yet on 29 January 2005. Further, a dividend claim legally only exists when a duly recorded decision has been taken by the General Assembly to generate enforceability and maturity.

Evidence: – Original Legal
Opinion certified
with apostille
regarding a divi-
dend claim pur-
suant to Cypriot
laws and the
statutes of Itera
Group Ltd. by
Andreas Neocleous
& Co. dated 14
August 2006 Annex 1

– Original certified
copy with apostille
of Articles of
Association (Sta-
tutes) including
amendments
dated 20 June
2006 Annex 2

79. It is correct and has never been disputed by the defendants that on 23 March 2005 an interim dividend of USD 40'000'000. – was decided and paid out by the board of Itera Group Ltd. in accordance with the legal and statutory requirements.

Evidence: – Original certified
copy with apostille
of confirmation by
Mr Andri Papado-
poulou of Montra-
go Services
Limited dated 14
August 2006 Annex 41

- Original certified copy with apostille of the minutes of the Board of Directors Meeting of Itera Group Limited held on 23 March 2005 and dated 14 August 2006

Annex 42

80. The prorated interim dividend was paid to Ms Galina Weber, defendant 3, at a percentage of 14,5714% of USD 40'000'000. - resulting in USD 5'828'560. - in two installments in the amount of USD 4'800'000. - and USD 1'028'560. - on 28 March 2005. Evidently, defendant 3 received these payments, since they have been deducted in the agreement dated 7 June 2006.

Evidence: - Original certified confirmation of the bank with apostille of FBME Bank Ltd. of the payment of USD 4'800'000. - from the bank account of ITERA Group Ltd. to Ms Galina Weber dated 23 March 2005 dated 24 July 2006.

Annex 3

Original certified
confirmation of the
bank with apos-
tille of FBME
Bank Ltd. of the
payment of USD
1,028,560. – from
the bank account
of ITERA. Group
Ltd. to Ms Galina
Weber dated 28
March 2005 dated
18 August 2006.

Annex 4

81. The ITERA Group Ltd., therefore, neither decided, much less paid out, an ordinary nor an interim dividend in the amount of USD 80'000'000. – . Nor was a “2nd tranche” of a dividend, i.e. a second amount of USD 40'000'000. – decided or paid out.
82. It must be explicitly emphasized that the payment of 3 June 2005 mentioned in the agreement dated 7 June 2006 is not, as alleged, a paydown as “part of the 2nd tranche”. To the contrary.
83. The obtained bank confirmation shows that the payment of USD 1'028'560 was not made by ITERA Group Ltd. – let alone was it a paydown on any 2nd tranche – but it was paid by a company called AMPLE TIME ENTERPRISE LIMITED. Significantly, after a preceding phone conversation, this transaction was triggered by instructions of Urs Weber himself [!] on 30 May 2005. As reason for the payment he himself instructed to include the note “RE. TRII”. This

probably means tranche 2. This also clearly contradicts the procedures that ITERA Group Ltd. Normally follows when paying out dividends, as can be seen from the way the interim dividend was resolved and paid out. It has to be further pointed out that according to the first and second bank confirmation dated 28 March 2005 defendant 3 had the undisputed dividend payments transferred to her account at Barclays Bank in Monaco, see swift information on statement, however, the third payment was paid to her account no. [Financial Account Number Omitted] at UBS in Zurich.

Evidence: – Original certified confirmation of the bank with apostille of FBME Bank Ltd. of the payment of USD 1,028,560. – from the bank account of Ample Enterprise Limited to Ms Galina Weber dated 3 June 2005 dated 18 August 2006.

Annex 5

– Copy Email from Mr Urs Weber dated 30 May 2005 Annex 6

H. About the Objections of the Defendants

84. In the presence of the legal counsel in charge of the mandate defendants 1 and 3 always expressed it confidence and delight in being able to finally present their side of the story in front of a Swiss Court. In the pre-trial stage, however, they are apparently incapable of doing so for tactical reasons. This is evident from the letter of defendant 3.

Evidence: – Copy email of Urs
Weber including
letter of Ms Galina
Weber dated 16
August 2006 Annex 38

85. The legal counsel in charge of the mandate has understood and taken note of this statement to mean that in the course of the criminal investigation to be initiated the defendants want to disclose transactions and secrets, to which they had access during their mandate or in their function as body of the company or in which they themselves participated.
86. To safeguard the plaintiff's interests already today, we herewith express its interest in the prosecution of all punishable acts coming to light during this criminal investigation, and charges are already preventively brought for these offences, as well.
87. It must further be expressly stated that the plaintiff is looking forward to hearing the statements of the defendants unperturbedly.

88. To appropriately rank the legal position of the defendants it must also be mentioned that for a long time now defendant 3 has been trying to prevent an increase of share capital of Itera Group Ltd. using civil law measures. This action is summarized by the affidavit of legal counsel Mr Stamatiou as synopsis of case No. 1508/06 of the District Court of Limassol.

Evidence: – Original certified
copy with apostille
of affidavit of Mr
Costas Stamatiou,
legal counsel,
dated 7 August
2006

Annex 7

89. Defendant 3 filed a writ of summons that in the meantime was declared without legal foundation by the responsible court. It was decided that defendant 3 had been duly represented, at the General Assembly meeting, she had the opportunity of also increasing her share, however, she waived her right to do so for financial reasons, therefore, her annulment claim was completely unjustified
90. All this does not directly concern the present action, since depleting the plaintiff's asset "based on some fabricated rationalization" could never be justified by a civil law claim against the group's mother company ITERA Group Ltd..
91. Nevertheless, it should be emphasized that defendant 3 is still dwelling on an "all encompassing claim", which is further expressed in

her letter dated 16 August 2006. It must further be stated that the Cypriot lawsuit does not include any mention of any kind of unpaid dividend claim (Affidavit Mr Stamatiou, legal counsel, page 2, end of 1st paragraph).

- Evidence:** – Copy email of Urs Weber including letter of Ms Galina Weber dated 16 August 2006 Annex 38
- Original certified copy with apostille of affidavit of Mr Costas Stamatiou, legal counsel, dated 7 August 2006 Annex 40

IV. LEGAL BACKGROUND

A. Embezzlement pursuant to Art. 138, point 1, PC

92. Whoever appropriates a moveable object belonging to another that is entrusted to him, with the unlawful intent to enrich himself or another, whoever unlawfully uses assets entrusted to him for his own or another's benefit shall be sentenced to the penitentiary for up to five years or imprisonment.
93. The property "Burg Waldegg" was in the sole possession of the plaintiff at the time of the offence. The bearer mortgage note instituted on

the property was in the care of defendants 1 and 2.

94. This bearer mortgage note was an object belonging to another – it was even an officially registered security belonging to another – that under the law and by contract was entrusted to the defendants 1 and 2 in their function as board members; this entailed obligations to exercise diligence and trust towards the plaintiff. By handing over the bearer mortgage note to defendant 3 with no conditions or compensation attached to this transfer, the defendants showed their intent to misappropriate the asset and therefore finalized the embezzlement. By handing over the bearer mortgage note that had been entrusted and did not belong to them, to defendant 3, defendants 1 and 2 gave up their custody and helped defendant 3 establish her own custody in violation of their duties to exercise diligence and trust.
95. Defendants 1 and 2 undoubtedly acted consciously and deliberately and therefore willfully pursuant to Art. 18, PC, since they even recorded their punishable acts in writing in the sale and purchase agreement dated 8 June 2006 and pretended to justify this action with an inexistent dividend claim. The objective and subjective factual elements of the embezzlement offence are therefore satisfied for defendant 1 and 2. There are no justifications or reasons for excluding guilt discernible, in particular, no error in a point of law is apparent, since, as lawyer and trustee, they were very well aware of their actions that had been prepared well in

advance. The enrichment through embezzlement for defendant 3 is directly given by the multiplication of her assets in the form of a bearer mortgage note enforceable at any time in the amount CHF 6'500'000.- , and for defendant 1 indirectly, as he is the husband of defendant 3, through marriage and inheritance law provisions.

96. Defendant 3 can in no way be seen as bona fide buyer, since it was presently the fictitious dividend claim that she wanted to secure with the custody of the bearer mortgage note. Defendant 3, therefore, is to be punished at least as willful accessory before the fact pursuant to Art. 24, PC in the embezzlement case of defendants 1 and 2, since she must have been the one awaking the decision to commit the offence. The criminal investigation must establish, whether there was a common decision taken by all three defendants, and if so, defendant 3 may also be judged as accomplice.

B. Embezzlement as Trustee pursuant to Art. 138, point 2, PC

97. Qualified Embezzlement pursuant to Art. 138, point 2, PC is committed and sentenced to the penitentiary for up to ten years or imprisonment, by whoever commits the offence in his capacity as a member of an authority, as an official, guardian, curator, professional asset manager, or in exercising a profession, trade or a business for which he has been officially licensed.

98. Defendants 1 and 2 were active as bodies of the plaintiff, which according to Federal Supreme Court Rulings is not considered a professional asset manager function, even though defendant 2 was a board member based on his trustee function.
99. Defendant 1 was also working as legal counsel in commercial matters for the Itera Group and the plaintiff itself. He was the Head of the Legal Team and Financial Committee and as commercial lawyer he was autonomously entrusted with the assets of the Itera Group and the plaintiff.
100. Outside his fiduciary activities defendant 1 generated substantial revenues as lawyer in commercial matters, sometimes in the magnitude of half a million to one million Swiss Francs per year, by this the Federal Court criteria for a professional asset manager function are satisfied: Professional asset management may according to the Federal Court Decision 6S.249/2002 not be lightly assumed unless specific criteria are met. A professional asset manager is only,

“ . . . whoever independently and professionally manages assets of a third party in their interest and within the scope of potential instructions. This activity is professional, if it represents a substantial part of the gainful employment of the manager and is of significant volume.”

Evidence: – Accounting and
Tax records of
Mr Urs Weber
of the last five
years Sequestration

101. Also for the qualified offence of embezzlement defendant 1 undoubtedly acted consciously and deliberately and therefore willfully pursuant to Art. 18, PC, since he was well aware of his position, as legal counsel in commercial matters and asset manager with signatory rights, and deliberately abused these.

C. Multiple disloyal management in the form of breach of trust pursuant to Art. 158, point 1, PC

102. Multiple disloyal management in the form of breach of trust pursuant to Art. 158, point 1, PC, is committed, shall be punished by imprisonment and sentenced to the penitentiary for up to five years, by whoever is entrusted by law, an official mandate, or a legal transaction to manage the assets of another or to supervise such asset management and, in violation of his duties, causes or permits that these assets are damaged.
103. Defendants 1 and 2, by their legal and contractual duties as board members of the plaintiff were entrusted with the management of the assets.
104. By accepting the assigned claim sight unseen and in mala fide they violated their legal and

contractual duties and caused an inexistent claim to be accepted in the name of the plaintiff, the assignee. In violation of their duties they neglected to assess the existence and enforceability of the assigned claim themselves. Due to the family relations and in collusion with the assignor, they further refrained from mandating an external lawyer and the auditor to verify the claim on its legal merits.

105. Defendant 1 and 2 undoubtedly acted consciously and deliberately and therefore willfully pursuant to Art. 18, PC. As lawyer and trustee, they knew that such assigned claim entailed legal and financial risks, which should not have been left unchecked. Further, they also knew of the intrinsic conflict of interest with regard to the spouse and sister-in-law. In this constellation they consciously and deliberately decided to neglect their duties towards the plaintiff and in the name of and without instructions from the plaintiff signed an assigned claim that was unchecked and contained numerous adverse safeguard clauses for the plaintiff.
106. The offence was perpetrated more than once and with great criminal energy, since defendants 1 and 2 systematically represented the plaintiff in violation of their duties and engaged it several times contractually to its detriment as follows:
 - Acceptance of warranty exclusion for existence and enforceability of the assigned claim [!];

- Acceptance of taking on the full change of ownership costs, including taxes, by the plaintiff;
- Acceptance that the costs for a possible cancellation of the contract would be borne by the plaintiff
- Acceptance of a penalty clause in the amount of CHF 6'500'000. – in case the full purchase price claim would not be covered, when the contract was cancelled;
- Acceptance that the bearer mortgage note remains with defendant 3 even when the contract is cancelled, until all outstanding claims or the penalty are paid;
- Acceptance that all costs incl. mortgage rate after the sale [!] are borne by the plaintiff;
- Acceptance of the right of defendant 3 to secure all these cost before the property is transferred back in the land registry.

107. In the same violation of their duties and without verification, defendants 1 and 2 accepted a worthless assignation. This led to a significant damage threatening the survival of the plaintiff, since the main asset out of the balance sheet was given away without any corresponding compensation. From a legal and financial point of view this assignation is simply worth nothing.

108. In addition, the defendants in violation of their duties made sure in a legal transaction that the enforcement of the warranty claim regarding the existence of the assigned claim must in any case be pursued through many legal instances. In case of success, the plaintiff would then, according to this mala fide agreement dated 7 June 2006, even have to pay a penalty to defendant 3 [!].
109. This clearly shows that the plaintiff or one of the group companies was going to be coerced into paying the inexistent dividend claim. During the meeting held on 8 August 2006 the defendant also expressed the statement that he was expecting a settlement offer in the form of the payment of USD 4'800'000 in return for Burg Waldegg.
110. Also for this punishable offence perpetrated by defendants 1 and 2 defendant 3 cannot be seen as acting in good faith and must at least have acted as accessory before the fact, if not even as accomplice.

D. Multiple disloyal management in the form of abuse of power pursuant to Art. 158, point 2, PC

111. Multiple disloyal management in the form of abuse of power pursuant to Art. 158, point 2, PC is committed and sentenced to the penitentiary for up to five years or imprisonment, by whoever, with the intent of unlawfully enriching himself or another, abuses the power of authority conferred upon him by law, an official

mandate, or a legal transaction and thus damages the assets of the person represented.

112. Defendants 1 and 2 were the legal and contractual representatives of the plaintiff during the sale of the property to defendant 3. They abused their authority by acting contrary to instructions and without internal authorization and by selling the property Burg Waldegg to defendant 3.
113. Defendant 1 and 2 undoubtedly acted consciously and deliberately and therefore willfully pursuant to Art. 18, PC. As lawyer and trustee, they knew that their legal transactions with a spouse and sister-in-law would entail a conflict of interest; that it would in no way be covered by the authority placed in them and that therefore, they would need special authorization to carry out such a transaction.
114. The defendants did not obtain an internal authorization that gave them the authority to conclude all important objective and subjective contract stipulations, in particular the stipulation of selling to the own spouse and acceptance of the assigned claim. They knew [sic] in advance that such authorization would never be given, since the sales negotiations had been stopped, much less would a sale to the spouse with the acceptance of an inexistent claim be allowed.
115. The defendants acted with the clear intent of enriching defendant 3 directly by letting her take over Burg Waldegg as the new proprietor. By these actions defendant 1 enriched himself

at least indirectly through his marriage and inheritance law claims to the assets of his wife, defendant 3.

116. Also for this punishable offence perpetrated by defendants 1 and 2 defendant 3 cannot be seen as acting in bona fide and must at least have acted as accessory before the fact, if not even as accomplice.
117. Further, additional, as yet unknown accomplices cannot be excluded.
118. Moreover, defendants 1 and 2 abused their legal authority by concluding contractual clauses that are openly and deliberately mala fide, e.g. the acceptance of the exclusion of the obligation of warranty and existence of the assigned claim, as well as the above mentioned contract provisions. The fact that absolutely arbitrary and void contract clauses, which for any bona fide lawyer or trustee are downright unbelievable, were accepted, shows that defendant 1 and 2 did not even try to keep up the pretence of acting as instruction abiding board members. Both should at least know from the wording of the law that the exclusion of warranty of the existence of an assigned claim is legally impossible pursuant to Art. 171, para. 1 of the Swiss Code of Obligations [CO, SR 220]. The assignor is in any case liable for the existence of the assigned claim, however, the defendants wanted to avoid that by all means, since they knew of the inexistence of this claim or they at least knew that there was no circumstantial [sic] evidence to prove their claim.

119. The defendants acted inappropriately more than once, since they abused their authority when instituting the bearer mortgage note, when concluding the agreement dated 7 June 2006 and the assignment declaration dated 7 June 2006 as well as the sale and purchase agreement dated 8 June 2006.

E. Attempted Coercion pursuant to Art. 181, PC, together with Art. 22, PC

120. Coercion pursuant to Art. 181, PC is committed and punished with imprisonment or fine, by whoever coerces somebody by force or by threatening with serious disadvantages or by limiting the freedom of action in some other way, to do, refrain from doing or tolerate something.
121. Through these legal transactions the defendants dearly attempted to coerce the plaintiff or one of the group companies into paying the fictitious dividend claim.
122. The defendants tried to influence the free will of the plaintiff by depriving it of its main asset on the balance sheet and by agreeing to detrimental clauses for the plaintiff in legal agreements, in order to make sure that in the end it would only be able to choose the "way of least resistance" [sic] and pay the fictitious dividend claim to remediate the damage done to the equity as quickly as possible.

123. This intentional action was even legally disclosed, when they stated in point 2 of the agreement:

"By concluding this agreement the seller [plaintiff] acknowledges that the buyer [Defendant 3] only bought the property "Burg Waldegg" based on the existing settlement opportunity due to the outstanding dividend claim."

Evidence: – Copy Agreement
between GASI-
TERA Suisse AG
and Ms Galina
Weber dated 7
June 2006

Annex 26

124. The intent to coerce is also shown by the legally agreed penalty clause for the settlement of the alleged dividend claim (point 1 of the agreement dated 7 June 2006). The same applies to the legal agreement that the deed remains in the hands of defendant 3 *even if the contract is successfully annulled* until the total alleged dividend claim plus interest has been paid (point 3 of the agreement dated 7 June 2006).

Evidence: – Copy Agreement
between GASI-
TERA Suisse AG
and Ms Galina
Weber dated 7
June 2006

Annex 26

125. The disadvantages, i.e. the insolvency of the plaintiff, came to pass and are therefore apparent.
126. The defendants thus did everything that in their imagination was necessary to coerce the plaintiff to pay out, without, however, reaching their objective. Therefore, there is a suitably accomplished attempt at coercion by the defendants pursuant to Art. 181, PC, together with Art. 22, PC.

F. Attempted Fraud pursuant to Art. 146, PC, combined with Art. 22 PC

127. Fraud is committed and sentenced to the penitentiary for up to five years or imprisonment, by whoever, with the intent of unlawfully enriching himself or another, maliciously misleads another person by false representation or dissimulation of facts, or maliciously reaffirms the error of another, and thus causes the deceived person to act detrimentally against his own or another's property.
128. The great criminal energy and the attempt at fraud by defendant 1 is again apparent from the agreement dated 7 June 2006, where it is suggested that a prorated dividend claim in the amount of USD 11'657'120 exists, which had already been served with *three* installments.
129. As mentioned it is undisputed between the plaintiff and the defendants that an interim dividend of USD 40'000'000 was bindingly decided on 23 March 2005. Therefore, from that date a prorated dividend claim in the amount

of USD 5'828'560 rightly existed for defendant 3. This claim was settled already five days after in two installments of USD 4'800'000 and USD 1'028'560, i.e. on 28 March 2005. Therefore, the dividend claim of defendant 3 expired through payment on 28 March 2005.

130. The defendant now alleges the existence and maturity of an additional dividend claim in the same amount (two times USD 40'000'000. – or once USD 80'000'000), a fact that is disputed by the plaintiff.
131. By stating that this *third* payment dated 3 June 2005 was in the same amount as the second payment, defendant 1 tried to imply that such alleged dividend claim existed.
132. In the personal meeting held on 8 August 2006 he then also asked the rethorical [sic] question, why ITERA Group Ltd would have paid an installment on the 2nd tranche in the partial amount of USD 1'028'560. – on 3 June 2005, if this second dividend claim did not exist.
133. Today this can be very clearly answered at the expense of defendant 1.
134. The third payment dated 3 June 2005 first of all did not come from ITERA Group Ltd., but from a company called AMPLE TIME ENTERPRISE LIMITED. Secondly, this payment was not instructed by ITERA Group Ltd., but by defendant 1 himself probably again in violation of his duties.

135. From these facts it is apparent that defendant 1 with great criminal energy fabricated a "duplicate payment" in the same amount and currency of the first, incl. the note "TR II" (probably for tranche 2), to be able to prove the validity of his allegation by using fictitious evidence and, in the inversion of the argument, pointing out that the second payment was in the same amount.
136. All these activities and payment structures then found their mention in the agreement and assignement [sic] declaration dated 7 June 2006 and in the sale and purchase agreement and change of ownership deeds dated 8 June 2006.
137. Defendant 1 then inserted this fabricated substantiation and implications of the existence of a second dividend claim in the negotiations for the settlement, to maliciously mislead the representatives of the plaintiff, thereby affirming an error and trying to get a pre-trial acknowledgement of the second dividend claim in return for the annulment of the sale of the property as the corresponding asset placement.
138. Through these machinations defendant 1 perpetrated a maliciously false representation, since normally the information contained in the agreement and assignment declaration dated 7 June 2006 would not have been questioned and the alleged legitimacy of the third payment would have been accepted as advance payment on the existing dividend claim. In particular, this could have worked since defendant 1 himself was also the Head of the Legal

Team and Financial Committee of Itera Group Ltd.

139. Defendant 1 thus did everything that in his imagination was necessary to create this false representation, without, however, reaching his objective. Therefore, there is a suitably accomplished attempt at fraud by defendant 1 pursuant to Art. 146, PC, together with Art. 22, PC.
140. Defendant 1 is also suspected of being punishable in connection with Ample Time Enterprise; this is currently being investigated further by the plaintiff.

G. Forgery of documents pursuant to Art. 251, para. 1, PC

141. Pursuant to Art. 251, point 1, PC, whoever, with the intention of damaging [sic] another's property or other rights, or of procuring an unlawful benefit for himself or another, falsifies or alters [sic] a document uses an authentic signature or an authentic hand print of another for the production of a false document or falsely certifies or has certified a legally substantive fact, uses such document to deceive someone, shall be sentenced to the penitentiary for up to five years or imprisonment.
142. All three defendants are guilty of forging a document by issuing the agreement dated 7 June 2006 and the assignment declaration of the same day. They used real documents with false content to willfully damage the plaintiff

and to create an unlawful benefit for defendant 3 directly and defendant 1 indirectly through marriage and inheritance law. In addition, both documents present a qualified susceptibility of proof, since they both serve as basis for the sale and purchase agreement as well as the change of ownership deeds recorded in the land registry and dated 8 June 2006.

143. The content of the two documents is false, since on the stated dates of 21 January 2005 and 28 May 2005 no General Assembly decisions were taken, from which a prorated dividend on USD 80'000'000 arose for Ms Galina Weber. Such recorded and therefore conclusive claim also did not arise on the alleged date that was provided at a later stage, 29 January 2005, as can be proven.
144. Therefore, the assigned claim is simply fictitious and the content of the documents, i.e. the proof of existence of the assigned claim, is false.
145. Defendant 1 and 2 undoubtedly planned this meticulously, thus acted consciously and deliberately and therefore willfully pursuant to Art. 18, PC. As lawyer and trustee, and defendant 1, as Head of the Legal Team and Financial Committee, even more so, they were aware of the fact that a dividend claim can only arise from a formal, recorded decision and if such decision is not provided, the claim does not arise, cannot be assigned and much less does it mature.

146. The defendants produced genuine documents with false content by concluding an agreement and an assignment declaration dated both 7 June 2006. Their content is false, since the defendants knew that there had never been a General Assembly resolution, in which a dividend on the total of USD 80'000'000. – or two tranches of each USD 40'000'000. – had been decided, much less did that happen on the dates stated in the documents, i.e. 21 January 2005 and 28 May 2005; nor was such decision taken on the later alleged date of 29 January 2005.

H. Obtaining false certification by fraudulent means pursuant to Art. 253, PC

147. False certification is obtained pursuant to Art. 253, PC by whoever induces through deceit an official or a public functionary to falsely certify a legally substantive fact, in particular, a false signature or an inaccurate copy, whoever uses a document so surreptitiously obtained to deceive another with regard to the fact certified therein, and shall be sentenced to the penitentiary for up to five years or imprisonment.
148. The defendants used the genuine documents with false content to deceive the clerk in charge of the land registry, Mr Josef Mäder, (land registry administrator deputy of the land registry of the town St. Gallen), who is a public functionary.

Evidence: – Mr Josef Mäder witness

149. The defendants deceived the clerk in charge of the land registry by presenting genuine documents with false content, i.e. the agreement and assignment declaration dated 7 June 2006 that became an integral part of the sale and purchase agreement dated 8 June 2006 and was thus certified by the clerk in charge of the land registry.
150. In particular, the clerk in charge of the land registry was deceived about the information that the property Burg Waldegg was purchased by the transfer of an assigned claim in the amount of CHF 4'100'000. – and that this claim really existed, which is demonstrably false.
151. Through this deceit the defendants succeeded in having a simulated legal transaction certified, by simulating a reward in the amount of CHF 4'100'000. – through genuine documents with false content. Effectively the transaction was an illegal, unauthorized donation or part donation to Ms Galina Weber in violation of the defendants' duties and contrary to the instructions of the plaintiff, since no consideration existed.
152. Defendants undoubtedly acted consciously and deliberately and therefore willfully pursuant to Art. 18, PC.

I. Mismanagement pursuant to Art. 165, point 1, PC

153. Mismanagement pursuant to Art. 165, point. 1 is perpetrated and if he has been declared bankrupt, or if a loss certificate has been issued against him, or pursuant to Art. 171, para. 1, PC a compensation agreement approved by the court has been accepted and confirmed, is punished with imprisonment of up to five years, who as a debtor in a manner different from the one described in Article 164, by mismanagement, in particular [sic] by thin capitalization, exaggerated expenditures, risky speculations, careless giving or using credit, wasting assets, or by gross negligence in the exercise of his profession or the management of assets, causes or aggravates his overindebtedness, causes his insolvency or, while knowing of his insolvency, aggravates his financial situation. This by observing the applicability of the punishability of whoever acts as a body or a member of a body of a legal entity pursuant to Art. 172, para. 1, PC.
154. The punishability of the offence pursuant to Art. 165, point 1, PC requires that the declaration of bankruptcy, loss certificate or compensation agreement approved by the court must be provided. To date that is not the case.
155. Nevertheless, it must be pointed out that defendants 1 and 2 squandered assets of the plaintiff by selling Burg Waldegg and therefore caused the insolvency of the plaintiff through gross negligence in their professional roles. It

will be shown in the near future whether the balance sheet of the plaintiff can be recapitalized or whether insolvency will have to be declared.

156. The defendants undoubtedly acted consciously and deliberately and therefore willfully pursuant to Art. 18, PC.

J. Unauthorized financial intermediation pursuant to Art. 36, MLA

157. Any person who acts as financial intermediary within the scope of Article 2 para. 3, without authorisation according to Art. 14, MLA or without joining a self-regulating body shall be punishable by a fine of a maximum of CHF 200'000 pursuant to Art. 36 MLA. Negligence shall also be punishable.
158. Defendants 1 and 2 fall into the unlimited geographic scope of application of the Money Laundering Act as they are domiciled in Switzerland.
159. The excerpt of the commercial register of the plaintiff shows that up to 17 July 2006 defendants 1 and 2 acted as board members and therefore, bodies of the company.
160. Pursuant to the Money Laundering Act the plaintiff is not a commercially active company, but a domiciliary company. Defendants 1 and 2 therefore acted exclusively as fiduciary bodies of a domiciliary company.

161. The Money Laundering Control Authority in its Commentary regarding the applicability of the MLA refers to the definition of domiciliary companies as follows (Unterstellungskommentar Kontrollstelle: The personal and geographic scope of application of the Money Laundering Act in the non-banking sector, Berne, 22 December 2004, page 10ff [<http://www.gwg.admin.ch/d/publika/pdf/34276.pdf>]):

"In general Board of Director mandates and other functions as bodies of a company are not regarded as financial intermediation functions. The person concerned in this case acts as body of the company and therefore does not dispose of third party assets, but of own assets, the assets of the company. The assessment, however, is different for fiduciary body activities [underlined by plaintiff] that under certain circumstances must be classified as financial intermediation. [...]"

Domiciliary companies are organised associations of persons and organised asset units that do not perform any commercial or industrial activities, or other enterprise carried out in a commercial manner. An important element in the decision whether it is a domiciliary company or not, is generally the fact that the company does not have its own offices or staff in the country. The place of incorporation is irrelevant to the applicability for the bodies of a company. Domiciliary companies may be incorporated both in Switzerland or abroad,

wherease [sic] in the latter case one generally speaks of offshore companies.

The term domiciliary company is to be understood in a non-technical manner. Normally, it concerns financial vehicles that are used for the management of the beneficial owner's assets. Domiciliary companies exist in the most different legal forms from corporations, in particular with bearer shares, to family foundations and institutions to trusts.

From a legal point of view the applicability for bodies of domiciliary companies is justified by the fact that such bodies act on instructions of beneficial owners, i.e. in a fiduciary manner. As a consequence the legal independence of the company cannot be taken into account. Bodies of domiciliary companies do not act as part of the domiciliary company itself and, therefore, do not dispose of own funds. Rather they act upon instructions of the beneficial owner in charge of the domiciliary company and dispose of third party assets, i.e. the assets of the beneficial owner.

The law consistently does not apply to beneficial owners, not even if they act as bodies of the company. Among other conditions, the applicability is bound to the requirement that the function as body of the company is carried out in a fiduciary manner. The requirement of following the instructions of third parties, however, does not apply,

when the beneficial owner him-/herself is acting as a body of the company.

Generally, all formal and material executive bodies of domiciliary companies are seen as financial intermediaries, if they have signatory powers, whereby dual signatory powers also meet the requirements for the applicability."

162. In the so-called summary decree [VB-GwG, SR 955.20] the condition of professionalism is defined based on thresholds. Therefore, a financial intermediary is professional as soon as he oversteps one of the following thresholds:

- A person acts in a professional manner, if pursuant to Art. 4 VB-GwG he/she achieves revenue of more than CHF 20'000 in one calendar year with activities that are subject to the MLA.
- A person acts in a professional manner, if pursuant to Art. 5 VB-GwG he/she initiates or maintains ongoing business relationships with more than ten contract parties in one calendar year.
- A person acts in a professional manner, if pursuant to Art. 6 VB-GwG he/she within the scope of these ongoing business relationships may dispose of third party assets that at any given time exceed CHF 5 million.

- Further, a person acts in a professional manner, if pursuant to Art. 7 VB-GwG he/she within the scope of the activities that are subject to the MLA pursues transactions that in total exceed CHF 2 million in one calendar year.
163. Defendants 1 and 2 probably already meet the threshold value of Art. 4 VB-GwG by earning more than CHF 20'000 from the revenue of their fiduciary activities as bodies of various domiciliary companies in one calendar year. They thus acted for the plaintiff in their role as fiduciary bodies and therefore, as professional financial intermediaries pursuant to Art. 2, para. 3, MLA.
- Evidence:** – Accounting and
Tax records of
Messrs. Urs and
Silvio Weber of
the last five
years
- Sequestration
164. The company Weber Treuhand AG, as already mentioned, is member of the self-regulating organization VQF and defendants 1 and 2 are registered as financial intermediaries of this company, Weber Treuhand AG.
165. Defendants 1 and 2, however, exercised their fiduciary body activities for GASITERA Suisse AG personally and in their own names and not in the name of Weber Treuhand AG.

166. Defendants 1 and 2 do not dispose of an authorization pursuant to Art. 14, MLA for pursuing financial intermediation activities in their own names nor are they members of a self-regulating association in their own names nor are they directly subjected to the Control Authority.
167. Therefore, Defendants 1 and 2 are pursuing unauthorized financial intermediation activities pursuant to Art. 36, MLA, which are punishable both as intentional as well as negligent act.
168. The strong suspicion arises that defendants 1 and 2, as commercial lawyer and trustee, are also illegally pursuing such activities to this day for other domiciliary companies.

V. CRIMINAL PROCEDURE

A. Risk in Waiting

169. According to motions 2 to 4 the plaintiff requests the immediate procedural order to freeze the registration in the land registry of the property "Burg Waldegg", the sequestration of the deed, i.e. the bearer mortgage note no. 17424 (probably located at the service address of defendant 3, i.e. the address of defendant 1) as well as the sequestration of the property "Burg Waldegg" with all its movables.
170. This is to be decided and executed immediately since there is a risk in waiting.

171. There is a risk in waiting since the defendants have been warned by their dismissal as Board members and the failed settlement negotiations and may be tempted to sell Burg Waldegg to a bona fide third party. Since they own the deed in the value of CHF 6'500'000, they are in a position to do so at any time and they have already proven their great criminal energy by the first sale, this shows that a second sale cannot be excluded.

B. Measures for the restriction of liberty

172. According to motion 5 the plaintiff requests measures to restrict the liberty of defendants 1 and 3. Defendant 3 is not domiciled in Switzerland, but in Monaco.
173. Defendant 1, her husband, therefore, also is more likely to have his place of residence with his spouse in Monaco and not in Switzerland. For these two defendants there is therefore the objective risk that they might escape, since they no longer have a close link to Switzerland and have sufficient financial funds to do so. Subjectively, the escape risk will arise when the criminal proceedings are opened and the defendants realize that their prior conduct and announcement that they will "disclose a big story" will and can not protect them from the criminal proceedings against them.
174. In particular, defendant 2 has not yet responded to any of the allegations against him. It could, therefore, be of interest whether the

facts of the case differ in the statements of defendant 1 and 2. It might also be necessary to verify, whether there is a risk of collusion, when the defendants are questioned.

C. Measures for Enforcing Claims for Damages

175. According to motion 6 the plaintiff requests the sequestration of the assets of the defendants in the amount of up to CHF 7'000'000. This in accordance with their legal right to the enforcement of their claims for damages and the indemnification of the official and extra-official procedural costs.
176. The only account known in Switzerland to date is defendant 3's bank account no [Financial Account Number Omitted] at UBS in Zurich, which on 3 June 2005 received the third payment that had been instructed by Urs Weber himself.
177. It is already foreseeable that the defendants will try to distract from the local offences by disclosing "big international stories". Therefore, substantial international investigations with translation costs, etc., as well as the official and extra-official costs will have to be carried out; these costs should be secured by sequestering the legally earned assets of the defendants already today.

VI. CIVIL CLAIM

178. According to motions 9 to 11 the plaintiff requests that the civil claim proceedings may be assessed at the same time as the judgment of this case.
179. Defendant 3, according to the agreement and assignment declaration dated 7 June 2006, willfully assigned a non-existent dividend claim of CHF 4'100'000 to the plaintiff as settlement.
180. The assignor therefore is liable to the plaintiff pursuant to Art. 41 of the Code of Obligations for the illegal and intentionally caused damage from unauthorized actions.
181. The assignor is further incontrovertibly liable pursuant to Art. 171 para. 1 Code of Obligation for the existence of the assigned claim at the moment of assignment. Different legal transactions are null and void.
182. Defendants 1 and 2 have handed over the bearer mortgage note no. 17424 in the amount of CHF 6'500'000 to defendant 3 without conditions or compensation, and moreover illegally sold Burg Waldegg to defendant 3 by accepting an unverified and worthless, assigned claim – or rather – illegally donated the property to her.
183. In this respect, defendants 1 and 2 are liable for damages to the plaintiff from unauthorized actions pursuant to Art. 41, CO as well as the

liability of the intentional violation of their duties as members of the Board of Directors of the plaintiff pursuant to Art. 717, para. 1, CO.

184. In addition, defendant 1 is liable as mandated commercial lawyer for the intentional negligence and disloyal management pursuant to Art. 398, para. 2, CO according to general agency laws.
185. Defendants 1 and 2 are further liable to the plaintiff as members of the Board pursuant to labor law for the intentional negligence and violation of the their duties pursuant to Art. 321a para. 1, CO.
186. Finally, it has to be stated that the defendants despite numerous requests did not attend to their legal and contractual duties for disclosure and accountability. Through these actions additional damage was caused with the initiation of these criminal proceedings. At the same time a reimbursement claim for the paid fees for the Board member activities as well as fiduciary and legal services arose. All this will be further specified by the plaintiff before the conclusion of the criminal proceedings pursuant to the reserved right for further claims and substantiation.

VII. COSTS

187. The plaintiff requests all this is to be investigated and judged and that costs and damages

should be at the expense of the defendants. According to the above-mentioned request these costs are to be secured beforehand.

188. During the settlement negotiations the defendants have received three deadlines to prove the legitimacy of their actions pursuant to their legal and contractual duties for disclosure and accountability that they let lapse unheeded. Therefore, the plaintiff had no other possibility than initiating criminal proceedings. The defendants intentionally caused the initiated criminal proceedings and are responsible for them in their entirety.

We kindly ask you to initiate and carry out the criminal proceedings as requested and to charge all ensuing costs and claims for damages at the expense of the defendants, and remain

Yours respectfully,

Christof Müller

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In The
Supreme Court of the United States

LAZAR S. FINKER, RAISSA M. FRENKEL,
STEVEN CHARLES KOEGLER, WILLIAM E. CHATTIN,
THEODOROS J. KAVALIEROS, and
AFRODITI KAVALIEROS,

Petitioners,

v.

GALINA WEBER,

Respondent.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit**

**OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI**

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RESTATEMENT OF QUESTIONS PRESENTED

Respondent Galina Weber ("Weber") respectfully submits that Petitioners' Questions Presented incorrectly exaggerate the relevance of The Treaty Between the United States of America and the Swiss Confederation on Mutual Assistance in Criminal Matters ("U.S.-Switzerland MLAT") to the instant dispute. As an initial matter, the issues cited in the Petition for Writ of Certiorari ("Petition") are effectively moot as the United States District Court for the Middle District of Florida ("District Court") and United States Court of Appeals for the Eleventh Circuit ("Eleventh Circuit") held that Respondent Weber was entitled to the *same* discovery in a Cyprus civil case as she was awarded in the Swiss criminal case at issue in the Petition. Moreover, the Petitioners failed to cite a single case that supports their argument that: 1) the U.S.-Switzerland MLAT and Title 28 U.S.C. Section 1782 ("Section 1782") are inconsistent; or 2) the U.S.-Switzerland MLAT somehow controls the outcome of this dispute. Respondent Weber was legally entitled to bring her discovery requests under Section 1782, which expressly provides for the application of the Federal Rules of Civil Procedure, and the U.S.-Switzerland MLAT does not control the outcome of this dispute. Accordingly, the questions presented should be restated as follows:

**RESTATEMENT OF
QUESTIONS PRESENTED – Continued**

1. Whether the Petition should be denied as effectively moot as the District Court and Eleventh Circuit held that Respondent Weber was entitled to the same discovery in a Cyprus civil case as she was awarded in the Swiss criminal case at issue in the Petition;

2. Whether the Eleventh Circuit properly concluded that Respondent Galina Weber was neither required to bring her request for judicial assistance under the U.S.-Switzerland MLAT nor satisfy the requirements thereof; and

3. Whether the Eleventh Circuit properly concluded that Respondent Galina Weber properly brought her request for judicial assistance under Section 1782, which expressly states that the discovery will be produced in accordance with the Federal Rules of Civil Procedure.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Rules of the Supreme Court of the United States, Respondent Galina Weber is an individual and accordingly there is no parent or publicly held company involvement.

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STATEMENT OF THE CASE

As affirmed by the Eleventh Circuit, the District Court did not abuse its discretion in determining that Respondent Weber is entitled to the discovery she seeks pursuant to Section 1782. The appellate and district court correctly applied both Section 1782 and this Court's decision in *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 124 S.Ct. 2466, 159 L.Ed.2d 355 (2004), and properly refused to apply the U.S.-Switzerland MLAT. The Petitioners entirely fail to address the fact that Respondent Weber sought discovery for use in two foreign proceedings, a Cypriot civil action and Swiss criminal action. The District Court, as affirmed by the Eleventh Circuit, awarded Respondent Weber the same discovery contested by the Petitioners in the Swiss criminal action, for the Cypriot civil action. Petitioners' Appendix ("Pet. App.") 18-37. Therefore, any ruling made by this Court would be effectively advisory in nature as regardless of the outcome of Petitioners' U.S.-Switzerland MLAT arguments, Respondent Weber was entitled to, and has received, the same documents in the Cypriot civil action and Petitioners did not appeal that aspect of the ruling.

Moreover, as to the Swiss criminal action, the Petitioners make their erroneous legal arguments without citing any legal support and by mistakenly referring to the 1996 Amendment to Section 1782 as a "clarification" rather than what it truly was – an amendment enacted by the United States Congress

and as it was expressly recognized by this Court in its *Intel* decision.

With other unsupported legal arguments scattered throughout the Petition, there is no doubt that the Petitioners failed to present a compelling reason for this Court to grant their Petition and it should be denied.

Respondent Weber is a citizen of Switzerland and a resident of the Principality of Monaco. Pet. App. 2. She is a shareholder of Itera Group, Ltd., a Cypriot corporation ("Itera Group"). Petitioners are also each shareholders of Itera Group. *Id.*

Respondent Weber filed suit in the District Court of Limassol, Cyprus against Defendants: 1) Itera Group; 2) Igor V. Makarov ("Makarov");¹ and 3) Sweet Water Intervest Corporation of the British Virgin Islands, (a private company controlled by Makarov) (hereinafter the "Cypriot Action"). The Cypriot Action was instituted because the Cypriot defendants conspired to improperly dilute Respondent Weber's ownership interest in Itera Group. Pet. App. 3.

Subsequent to the commencement of the Cypriot Action, criminal charges were filed by Gasitera Suisse A.G., an Itera Group subsidiary, against Respondent Weber in Switzerland for allegedly embezzling Itera

¹ Makarov was one of the original parties in the district court proceeding; however, Makarov was dismissed without prejudice in the Amended Petition. Pet. App. 18.

Group assets ("Swiss Action"). Her husband Urs Weber and brother-in-law Silvio Weber, both of whom were former Gasitera Suisse directors, were also named defendants. Pet. App. 3-4; 18-19. These Swiss allegations were based primarily on accusations and information provided by Makarov and Itera Group officials. Respondent Weber has cooperated with the criminal investigation and participated in the discovery process in both the Cypriot and Swiss Actions.

In order to aid her in both the Cypriot and Swiss Actions, Respondent Weber also required discovery from the Petitioners, whom were located in and around Jacksonville, Florida. Pet. App. 18. None of the Petitioners are named parties to either the Cypriot or Swiss Actions. Pursuant to Section 1782, Respondent Weber filed a Petition for Discovery in Aid of Foreign Proceedings on April 27, 2007. Pet. App. 4. As determined by both the lower courts, Respondent Weber satisfied the federal statutory requirements for seeking discovery in aid of foreign proceedings. Pet. App. 4-5. Specifically, Respondent Weber is an interested person in certain Swiss criminal and Cypriot civil proceedings, and she requires evidence in the possession or control of individuals residing in the Middle District of Florida in order to succeed in both foreign proceedings. Pet. App. 49-56.

In response, Petitioners have done all within their power to delay and thwart the timely receipt of

discovery by Respondent Weber.² As to the non-criminal Cypriot Action, which is effectively ignored in the Petition, the District Court found that each of Respondent Weber's eight requests for production were also relevant to the Cypriot Action. Pet. App. 18-37. Respondent Weber sought documents directly related to her specific claim in the Cypriot Action of improper dilution through the issuance of 6,000,000 new capital shares of Itera Group stock. Pet. App. 19. There is no dispute that Section 1782 and the Federal Rules of Civil Procedure apply to the Cypriot Action, an issue not even raised, much less contested, by Petitioners. The fact that the District Court awarded equivalent discovery in the Cypriot Action renders the Petition moot and merely advisory in nature. None of the arguments raised in the Petition apply to the Cypriot Action, as that aspect of the District Court's and the Eleventh Circuit's rulings have not been appealed, rendering this case an improper vehicle by which to address the meritless U.S.-Switzerland MLAT arguments raised by Petitioners.

The Petitioners have also incorrectly argued that the U.S.-Switzerland MLAT governs the request for discovery in the Swiss Action, along with the Federal

² In fact, Petitioners' improper attempts to delay caused the District Court, during a Show Cause Hearing on October 27, 2008, to state the following: "[I]n my view, when I look at this, it has every aspect of people who just don't want to produce documents, no matter what." See Respondents' Appendix ("Resp. App.") 3.

Rules of Criminal Procedure; however, case law and the clear language of Section 1782 enable Respondent Weber to elect to proceed under Section 1782 and make clear that the Federal Rules of Civil Procedure govern those procedures. Petitioners conveniently ignore that Article 38 of the U.S.-Switzerland MLAT expressly states that “[A]ssistance and procedures provided by this Treaty shall be without prejudice to, and shall not prevent or restrict, any available under any other international convention or arrangement or under the municipal laws in the Contracting States.” Pet. App. 108-109.

In the Swiss Action, the basket in which Petitioners theoretically place all their eggs, Respondent Weber is a defendant in a Swiss criminal action for allegedly embezzling Itera Group assets. Pet. App. 46. Pursuant to Swiss law, indebtedness is a complete defense to embezzlement. *Id.* The documents requested by Respondent Weber under Section 1782 directly impact the claims in the Swiss Action and Respondent Weber’s defense of indebtedness as well as her claims in the Cypriot Action. Pet. App. 18-37.

Additionally, as to the Swiss Action, despite Petitioners’ contentions to the contrary, legal authority exists holding that: 1) Section 1782 and the U.S.-Switzerland MLAT are consistent: 2) an interested person – there is no distinction between the criminal or civil context – may pursue discovery under Section 1782; 3) the documents shall be produced in accordance with the Federal Rules of Civil Procedure unless the district court prescribes otherwise; and

4) a Congressionally enacted amendment to a federal statute is an amendment – not a clarification.

Accordingly, the Eleventh Circuit and the District Court correctly resolved this case in favor of Respondent Weber, and the Petition should be denied.



SUMMARY OF THE ARGUMENT

The Petition is without merit. It does not present a compelling reason to grant certiorari. The District Court, as affirmed by the Eleventh Circuit, held that Respondent Weber was entitled to discovery as to each of her eight requests for production for use in the Cypriot Action. Petitioners fail to address this issue in the Petition and the effect of the lower court's ruling as to the Cypriot Action renders this case effectively moot and a particularly poor vehicle by which to argue for the application of the U.S.-Switzerland MLAT. In effect, even if Petitioners were entitled to a reversal of the Eleventh Circuit's holding regarding the Swiss Action, which they are not, the discovery awarded to Respondent Weber for the Cypriot Action is entirely unaffected. Effectively then, Petitioners seek an advisory legal ruling from the Court as to the theoretical effect of the U.S.-Switzerland MLAT, which is not a proper function of this Court's certiorari review.

Moreover, as to the Swiss Action, Petitioners have not established that the Eleventh Circuit: 1) entered a decision that was in conflict with the decision of

another United States court of appeals on the same important matter; 2) decided an important question of federal law that has not been, but should be, settled by this Court; or 3) decided an important federal question in a way that conflicts with relevant decisions of this Court. Instead the Petition: 1) erroneously attempts to apply the requirements of the U.S.-Switzerland MLAT to the facts of this case; 2) incorrectly avers the Eleventh Circuit failed to follow this Court's decision in *Intel, supra*; and 3) improperly attempts to change a Congressional amendment into a "clarification" so as to avoid the legal ramifications thereof.

As to the first point regarding the Swiss Action, the Petitioners completely ignore the fact that the Eleventh Circuit correctly found that: 1) "a plain reading of the treaty indicates that the MLAT is designed to facilitate discovery between States Parties [the United States and Switzerland];" and 2) the U.S.-Switzerland MLAT is silent as to its applicability to private citizens. Accordingly the entire foundation upon which the Petition is built – the mandatory application of the requirements of the U.S.-Switzerland MLAT – is fatally unsound.

After finding that the U.S.-Switzerland MLAT and Section 1782 were consistent with one another, the Eleventh Circuit also correctly found that Section 1782 "would still be the appropriate vehicle for Weber's discovery request under the last in time rule" even if, for argument's sake, Section 1782 and the U.S.-Switzerland MLAT were inconsistent. Pet. App. 8; *Whitney v. Robertson*, 124 U.S. 190, 194, 8 S.Ct.

456, 458, 31 L.Ed. 386 (1888); see also *Valencia v. United States AG*, 176 Fed.Appx. 979, 984, 2006 WL 1049411 (11th Cir. Apr. 20, 2006); *Guevara v. United States AG*, 132 Fed.Appx. 314, 319, 2005 WL 1220646 (11th Cir. May 24, 2005). The Eleventh Circuit correctly noted that Section 1782 was amended in 1996 and that the U.S.-Switzerland MLAT went into effect on January 23, 1977. *Fet. App.* 8. Accordingly, Section 1782 controls because it is last in time.

As to the *Intel* decision, the Eleventh Circuit meticulously followed the leading published decision on Section 1782 and did not deviate from it as Petitioners wrongfully allege. Specifically, the Eleventh Circuit cited *Intel* as follows: 1) private parties may seek discovery for use in a foreign proceeding through Section 1782; 2) discovery under Section 1782 is not limited to discovery that would be allowed under United States law in domestic litigation analogous to the foreign proceeding; and 3) the 1996 Amendment to Section 1782, which inserted the words "including criminal investigations conducted before formal accusation," signaled Congress' intent to further facilitate discovery by individuals for use in foreign criminal actions and underscores that Section 1782, as applied, is consistent with the U.S.-Switzerland MLAT and permissible under Article 38 of that same Treaty.

For all of the aforementioned reasons, the decisions below are neither questionable nor controversial

and certainly do not warrant further review by this Court.

REASONS FOR DENYING THE WRIT

For the reasons discussed *infra*, Petitioners have presented no compelling reasons for this Court to grant their Petition in that the discovery awarded to Respondent Weber for use in the Cypriot Action renders the issues raised in the Petition effectively moot and advisory in nature. Moreover, Petitioners fail to point to where the Eleventh Circuit: 1) entered a decision in conflict with the decision of another United States court of appeals on the same important matter; 2) decided an important question of federal law that has not been, but should be, settled by this Court; or 3) decided an important federal question in a way that conflicts with relevant decisions of this Court. *See Sup. Ct. R. 10.*

I. The Discovery Awarded to Respondent in the Civil Cypriot Action Renders the Issues Raised in the Petition Effectively Moot and this Case is an Improper Vehicle to Address the Arguments Raised in the Petition for Certiorari

The District Court, as affirmed by the Eleventh Circuit, properly held that the documents in question

in this case are independently discoverable in connection with the Cypriot Action. Pet. App. 18-37.

The Petitioners do not possess, and cannot raise, any argument that Section 1782 does not apply to the discovery sought by Respondent Weber for use in the Cypriot action. Rather, Petitioners have steadfastly ignored this crucial aspect of the lower courts' rulings and have chosen to base their Petition solely on the Swiss Action. The Cypriot aspect of the ruling below, having not been challenged, is final. This fault is fatal to the Petition.

Nowhere in the Petition do Petitioners acknowledge the crucial fact that the District Court applied the relevancy standard of Rule 26, Federal Rules of Civil Procedure, to the Section 1782 inquiry for the Cypriot Action, and made well reasoned decisions in granting discovery as to each of the eight requests for production served on Petitioners. Pet. App. 18-37.

Instead, in the Petition, Petitioners have asserted several meritless arguments, each related to their contention that the U.S.-Switzerland MLAT, and therefore, the Federal Rules of Criminal Procedure, should apply to the *Swiss Action*. Petitioners have not contended, nor can they, that a MLAT Treaty between the United States and Switzerland for use in criminal matters, somehow applies to a civil case filed by Respondent in Cyprus. Therefore, Section 1782 uncontrovertibly applies to the Cypriot Action.

Even if Petitioners were able to gain certiorari review and an eventual reversal as to the District

Court and Eleventh Circuit's rulings in the Swiss Action, there would be no effect whatsoever on the discovery awarded to Respondent for the Cypriot Action. The Petition is effectively moot and asks this Court to provide Petitioners with an advisory opinion as to the effect of the U.S.-Switzerland MLAT on discovery which is duplicated by that awarded for the Cypriot Action. Therefore, despite Petitioners' claims to the contrary, this case is not ripe for review. Even if Petitioners' arguments as to the Swiss Action had merit, which they do not, this case does not present the proper opportunity for this Court to decide the effect of the U.S.-Switzerland MLAT. Therefore, on the basis of the Cypriot Action rulings alone, this Court should deny the Petition.

II. The Respondent Properly Chose to Proceed in Accordance with Section 1782 and Therefore the U.S.-Switzerland MLAT is Not Relevant to this Dispute

The Eleventh Circuit properly found that Respondent Weber was not required to bring her discovery request under the U.S.-Switzerland MLAT. Pet. App. 7-9. The Eleventh Circuit opined that the U.S.-Switzerland MLAT provides for discovery between the Contracting Parties [the United States and Switzerland] and contrasted it with the language in Section 1782 that provides the means by which "any interested person" may seek discovery. Pet. App. 7-8. While the Eleventh Circuit expressly declined to hold that no private party could ever seek redress

under the U.S.-Switzerland MLAT, facilitated by their State Party, the Eleventh Circuit held that “a plain reading of the treaty indicates that the MLAT is designed to facilitate discovery between States Parties” and not private parties such as Respondent Weber. *Id.* Furthermore, the Eleventh Circuit correctly cited this Court’s *Intel* opinion for the purpose of establishing that private parties may seek discovery for use in a foreign proceeding pursuant to Section 1782. *Id.*

Furthermore, Petitioners also ignore that Section 1782 places the discretion of whether discovery should be granted with the district court. *See Intel*, 542 U.S. at 255-59 (2004). The application of the Federal Rules of Civil Procedure only becomes relevant after the district court exercises its discretion to permit discovery to take place. Pet. App. 11 (citing *In re Clerici*, 481 F.3d 1324, 1336 (11th Cir. 2007) (holding that “once discovery is authorized under § 1782, the federal discovery rules, *Fed. R. Civ. P.* 26-36, contain the relevant practices and procedures. . . .”) (emphasis added)). Accordingly, Petitioners’ argument that the Federal Rules of Criminal Procedure, if applied, would prevent the disclosure of discovery, is simply incorrect.

III. The U.S.-Switzerland MLAT is Not Inconsistent with Section 1782 and Therefore Section 1782 is Controlling

The Eleventh Circuit, like the other courts that have previously addressed this issue, correctly determined that the U.S.-Switzerland MLAT was consistent with Section 1782. Pet. App. 8; see *In re Request from the Swiss Fed. Dep't of Justice & Police*, 731 F.Supp. 490, 491 (S.D. Fla. 1990) (holding that a court must read relevant statutes as consistent with the U.S.-Switzerland MLAT if at all possible); *In re Request from L. Kasper-Ansermet, Examining Magistrate for the Republic & Canton of Geneva, etc.*, 132 F.R.D. 622, 628 (D.N.J. 1990) (noting that even under the U.S.-Switzerland MLAT, there is ample authority for using civil subpoenas to compel deposition testimony pursuant to Section 1782). In analyzing Section 1782 and the U.S.-Switzerland MLAT, the Eleventh Circuit found the latter permits the two States Parties to seek discovery assistance from each other whereas Section 1782 permits any interested person to apply to a federal court for discovery assistance. Pet. App. 7-9. The Eleventh Circuit also noted that the U.S.-Switzerland MLAT was silent on its applicability to discovery requests by non-States Parties. *Id.*

Moreover, Petitioners neglect to mention that Article 38 of the U.S.-Switzerland MLAT itself

provides that the United States may make available alternative and less restrictive mechanisms that may permit expanded discovery. Pet. App. 108-109. The U.S.-Switzerland MLAT established a minimum level of cooperation between the Contracting States, but Article 38 left open the possibility and permissibility of either State affording itself greater discovery. Section 1782, which provides for the possibility of broader discovery to parties seeking documents for foreign proceedings, is such a mechanism. Accordingly, the Eleventh Circuit correctly determined that Section 1782 and the U.S.-Switzerland MLAT were consistent with one another. Pet. App. 7.

Lastly, as to this point, accepting Petitioners' argument that the U.S.-Switzerland MLAT requirements should be enforced in foreign criminal proceedings would completely eviscerate the Congressional intent of Section 1782. Moreover, Petitioners' argument flies in the face of the expressed terms of the aforementioned Article 38.

IV. The Eleventh Circuit Properly Applied this Court's *Intel* Decision

The Eleventh Circuit's decision in this case was completely congruent with this Court's decision in *Intel*, *supra*, which remains this Court's most recent pronouncement on Section 1782.

This Court in *Intel* thoroughly analyzed over 150 years of congressional efforts to provide federal-court assistance in gathering evidence for use in foreign

tribunals. 542 U.S. at 247. The Court's review of the history of this effort illustrated Congress' consistent steps to broaden the ability of interested persons to gain access to discovery. *Id.* at 247-49. This Court specifically wrote that Congress "further amended § 1782 to add, after the reference to 'foreign or international tribunal,' the words 'including criminal investigations conducted before formal accusation.'" *Id.* at 249 (emphasis added). This 1996 Amendment is significant to this case because it further broadened the ability of criminal defendants to access discovery, but it is also nearly identical to the current circumstances of Respondent Weber in that she finds herself defending a criminal investigation that has not yet resulted in a formal charge being brought.

Moreover, Petitioners ignore the fact that *Intel* made clear the use of Section 1782 to gather evidence is appropriate even when the discovery in question might not be permitted in the underlying foreign country, thus negating any reasonable argument that the procedure of a treaty must be followed. *Id.* at 253. This is further evidence that Section 1782 should be interpreted to grant, not limit or prohibit, discovery.

Petitioners assert that the requested discovery should have been denied because it would not have been available in a criminal case in the United States. Respondent Weber denies that such a statement is either accurate or germane and points out that *Intel* rejected the suggestion that a Section 1782 applicant must show that United States law would allow discovery in domestic litigation analogous to the foreign

proceeding. *Id.* at 263. This Court specifically held that Section 1782 “does not direct United States Courts to engage in comparative analysis to determine whether analogous proceedings exist here. Comparisons of that order can be fraught with danger.” *Id.*

Finally, the Eleventh Circuit’s decision also correctly followed Section 1782, *Intel* and other applicable case law in holding that the Federal Rules of Civil Procedure applied in this case.³ Pet. App. 9-11; *Application of Sumar*, 123 F.R.D. 467, 469-70 (S.D.N.Y. 1988) (declining to apply the criminal rules even where the foreign proceeding was criminal in nature); *Bayer AG v. Betachem Inc.*, 173 F.3d 188 (3d Cir. 1999) (under ordinary circumstances, the Federal Rules of Civil Procedure apply when discovery is sought pursuant to Section 1782); see also *In re Request from L. Kasper-Ansermet, Examining Magistrate for the Republic & Canton of Geneva, etc.*, 132 F.R.D. 622, 628 (D.N.J. 1990) (holding that Federal Rules of Civil Procedure applied); *In re Application Pursuant to 28 U.S.C. Section 1782 for an Order Permitting Christen Sveaas to Take Discovery from Dominique Levy, L & M Galleries and other non-participants for use in Actions Pending in the Norway*,

³ The Petitioners’ unsupported argument that the discovery would not be available if the Federal Rules of Criminal Procedure are applied is irrelevant inasmuch as Article 38 of the U.S.-Switzerland MLAT allows the United States to permit broader discovery.

249 F.R.D. 96, 106 (S.D.N.Y. 2008) ("The proper scope of the discovery sought under Section 1782, like all federal discovery, is governed by Federal Rule 26(b)").

The holdings in these cases were based on the following clear statutory mandate in Section 1782, affording discretion (which was not abused below) to decide whether the civil or criminal rules of procedure would be applied:

The order may prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country or the international tribunal, for taking the testimony or statement or producing the document or other thing. To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure.

28 U.S.C. § 1782 (2008). In this case, the District Court, as affirmed by the Eleventh Circuit, affirmatively held that the Federal Rules of Civil Procedure were to apply. There can be no doubt that pursuant to Section 1782, this Court's decision in *Intel*, and other applicable case law, the Federal Rules of Civil Procedure apply to Respondent's discovery requests as to the Swiss Action.

Clearly the Eleventh Circuit's decision meticulously followed this Court's *Intel* decision.⁴

V. Congress Enacted an Amendment – Not a Clarification – of Section 1782 in 1996 and Therefore Even if Section 1782 Were Inconsistent with the U.S.-Switzerland MLAT, Section 1782 Controls Under the “Last in Time” Rule

In addition to alleging that the Eleventh Circuit failed to properly follow this Court's *Intel* decision, the Petitioners incredulously argue that the Eleventh Circuit also failed to recognize this Court's determination in *Intel* that the 1996 Amendment of Section 1782 was a simple clarification. Pet. 11-12. This Court made no such finding. Specifically, the Petitioners alleged that “[w]ithout explanation, the Eleventh Circuit rejected this straightforward determination and conclusion that the 1996 amendment was a clarification of the 1964 enactment.” Pet. 12. The

⁴ The same cannot be said for the Petitioners in their discussion of the decision in *Application of Sumar*, 123 F.R.D. 467 (S.D.N.Y. 1988), which Petitioners misinterpret. The Petitioners described it as “declining to apply the Federal Rules of Civil Procedure where the foreign proceeding was criminal in nature. . . .” Petition (“Pet.”) 15. That statement is grossly inaccurate. The Eleventh Circuit correctly cited the case, which involved discovery for a foreign criminal proceeding, for the exact opposite rationale than the Petitioners advance. Pet. App. 10. The Eleventh Circuit wrote that the *Sumar* decision declined “to apply the Federal Rules of Criminal Procedure where the foreign proceeding was criminal in nature.” *Id.*

Petitioners aver that “[c]larifications are not subsequent enactments” and suggest that the 1996 amendment was not an amendment that carries with it the legal ramifications thereof.

The Petitioners attempt to make this unfounded argument for the first time to this Court because they know the “Last in Time” Rule is well settled and serves to eviscerate the entire foundation upon which the Petition is based. The Petitioners attempt to buttress this meritless argument with a citation to a footnote in a concurring opinion in a criminal mail fraud case. Pet. 12 (citing *United States v. Svete*, 556 F.3d 1157, 1170 (11th Cir. 2009)). The footnote does not stand for the stated proposition. *Id.*

The Eleventh Circuit’s decision properly found that, even assuming arguendo, the U.S.-Switzerland MLAT and Section 1782 were inconsistent, Section 1782 was controlling because it was amended by Congress more recently than the U.S.-Switzerland MLAT. Pet. App. 8; *Whitney v. Robertson*, 124 U.S. 190, 194 (1888). Specifically, Section 1782 was amended in 1996 and the U.S.-Switzerland MLAT went into force on January 23, 1977. Pet. App. 8.

It is also important to note that the 1996 amendment to Section 1782 added the words “including criminal investigations conducted before formal accusation” after the reference to “foreign or international tribunal.” Pet. App. 60. This amendment evidences congressional intent that the United States

permit interested persons, including criminal defendants, to utilize Section 1782 even prior to formal accusations having been made. *Id.* Had Congress intended to limit individuals from utilizing Section 1782 or force individuals to seek discovery via the U.S.-Switzerland MLAT, Congress could have done so. *Id.* Instead, consistent with Article 38 of the U.S.-Switzerland MLAT, Congress intentionally broadened, not narrowed, the application of Section 1782.

Accordingly, the Eleventh Circuit properly found that Section 1782 controlled over the U.S.-Switzerland MLAT.

CONCLUSION

For the aforementioned reasons, the Petitioners failed to present any compelling reasons for this Court to grant their Petition for Writ of Certiorari. The rulings of the United States District Court for the Middle District of Florida and the United States Court of Appeals for the Eleventh Circuit awarding the identical discovery to Respondent Weber for use in the civil Cypriot Action require that the Petition for Writ of Certiorari be denied. Moreover, the lower courts properly applied 28 U.S.C. Section 1782, appropriately disregarded the application of the U.S.-Switzerland MLAT under the facts in this case, and correctly followed this Court's decision in *Intel Corp. v. Advanced Micro Devices, Inc.*, *supra*. Therefore Respondent Galina Weber respectfully requests this

Court enter an Order denying the Petition for Writ of Certiorari.

June 9, 2009

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

GALINA WEBER,	Jacksonville, Florida
Petitioner,	Case No. 3:07-mc-27-J-32MCR
vs.	October 27, 2008
LAZAR FINKER, et al.,	8:30 a.m.
Respondents.	Courtroom No. 10D

SHOW CAUSE HEARING
BEFORE THE HONORABLE
TIMOTHY J. CORRIGAN
UNITED STATES DISTRICT JUDGE

COURT REPORTER:

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(Proceedings reported by microprocessor stenography;
transcript produced by computer.)

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* * *

[18] some of these company documents, we believe, all fall within those -- within the parameters of our request for production.

Perhaps the deposition of one of the most knowledgeable persons regarding production of documents might be in order, or, as we had suggested, we file a written paper that more fully flushes out our position.

But, also, that the respondents, as part of the sanction -- because of the amounts of money we're talking about, a sanction really isn't going to mean anything. it's -- the actual full presence or attendance at a hearing, in which some questions may be asked to determine exactly what they did to comply with the court's order, would probably be the better sanction, from the petitioner's standpoint.

Thank you.

THE COURT: Mr. Lembcke, let me just -- and I want to do this briefly. I don't want to spend a lot of time on it. But I -- you know, the last thing in the world I want to do is to sanction anybody, ever. And, fortunately, very, very rarely it comes up.

But let me – let me just – and part of what I – I know you say, you know, you're not hiding anything. And I certainly have no reason to think you, as an officer of the court, would try to hide anything.

[19] But the – the history of this litigation just doesn't comport with an effort by your clients to be responsive to the court.

It is absolutely true that your clients – you representing them – and in your papers you say that whatever happened was my responsibility; it wasn't their responsibility. And I – you know, I'll accept that, if that's what you say.

But, you know, you're absolutely entitled to raise legal issues. But it just – in my view, when I look at this, it has every aspect of people who just don't want to produce documents, no matter what.

I mean, this – this thing was filed in May of '07. This was a chronology I put together this morning. And you will, I'm sure, correct me if I get anything wrong. It was opposed on legal grounds.

Judge Richardson, on October 11 of '07, entered an R and R because he thought I had to rule as a matter of law whether or not these legal objections were valid or not.

Probably he could have just ruled on them, but he, did it as an R and R. I looked at it. On November 30 of '07, I adopted the R and R, and it went back to him to actually determine which document should be produced.

But before he could do that, you appealed to the Eleventh Circuit in what anybody, who could look at it, [20] would say was clearly a non-appealable order. It wasn't a final order. I mean, I knew it as soon as I saw it.

Obviously, the petitioners – that was their position. And the Eleventh Circuit knew it as soon as it saw it. But it took three months.

So that – to me, that was – that was the first indication I had that – that your clients were not interested in getting an actual resolution of this; they were just interested in not producing these documents. At least that's the way I took it. Because I just couldn't understand how there could be an appeal of that order.

And so then the Eleventh Circuit, in April of '08, says, It's not an appealable order, it's not a final order. So then it comes back to Judge Richardson and he orders production of May 1st of '08.

You appeal that order. And one of your grounds was that Judge Richardson didn't have the authority to do it, when I think he clearly did. And I overruled the objections, denied the appeal, and ordered the production on June the 5th.

And then you file a motion to stay, which, you know, you were entitled to do. I didn't – I mean, I didn't really begrudge you that. And – but I didn't think that you were entitled to it.

I thought Judge Richardson had handled the matter [21] correctly. I thought that there had been enough delay in the case. I might have been more inclined to consider a stay if you had not already taken an appeal that I thought really wasn't meritorious. And so I denied the stay.

But in that order, I – I wanted to give you a chance to convince the Eleventh Circuit otherwise. Because I thought, Well, maybe I'm not looking at this right, maybe – maybe you've got something that I don't see here.

And so in my order of June the 11th, said, Well, I don't think there's a basis to stay pending appeal, but I recognize that if I – if I deny the stay outright, then it could moot the appeal.

So I delayed and I – I said that you could ask the Eleventh Circuit. Until the Eleventh Circuit ruled, I would – I would delay the – I would stay the order.

But in that order – and I want to find it – in that order – because I wanted to avoid what ended up happening – I put in big black letters, The Court orders respondent to gather the responsive documents forthwith so respondents will be prepared to produce them timely in the event the Eleventh Circuit denies the stay.

So that was June the 11th. So then the Eleventh Circuit denied the stay. And I thought, Okay. Well, five days from now, Mr. Lembcke will produce the

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documents. But you sought rehearing on the denial of the stay.

[22] Never heard of that before, but, you know, then Mr. Bean moved for sanctions. And I said, Well, as long as it's up in the Eleventh Circuit – and, if they're going to consider it, I guess I'll wait to see what they do.

And in your response to that – in your response to Mr. Bean's motion for sanctions, you – you said, Should the Eleventh Circuit panel deny respondents' petition for rehearing, then the order denying the same will become final. And then – I'm skipping a sentence.

And you say, Respondents have represented they will provide production within five days of receipt of the order denying petition.

That was the order you sent to me.

I said, you know, I'm not – I really think this thing has gotten dragged out, but if Mr. Lembcke says he will produce them within five days of the order denying the petition for rehearing, on that basis, I'm going to deny that, because I'm relying upon that representation.

And then as I – and, again, these are notes I made. You correct me if I'm wrong. The Eleventh Circuit denied that reconsideration, on September 17th of 2008.

I assumed that full production would be made without any question by September 22nd, 2008 – or September 23rd. Mr. Lembcke wrote you – I think it should have been September 22nd.

[23] Mr. Bean wrote you on September 23rd, basically saying, Where are the documents? You made it – what's called a partial production on September 30th of '08. And I couldn't understand why there should be anything partial about a production that, by order of June 11th of '08, you were required to have those documents ready to be produced on five days' notice.

So I couldn't understand why that should be a partial production, in any event. And it was late. It was about a week late from when you represented you would do it, and after having gotten me to deny a motion for sanctions based upon representations they would be produced five days after the denial of the stay, or denial of reconsideration of the stay.

And then I guess the Eleventh Circuit is set for oral argument. So you decided, well, that gives you another basis for delay. And you asked the Eleventh Circuit for relief.

In my mind, it gave you no basis to delay. You know, I don't know why the Eleventh Circuit set it, but they twice – not once, but twice denied your motion for stay.

And so, in my mind, you had every obligation to produce it when you said you would. And then, you

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know, you – you write Mr. Bean a letter – and I'm going to get this letter. I'm just telling you how this is looking to [24] me. You know, you may have a different view of it.

But October 6th of 2008 – so now – now you – you should have – under your representations, you should have produced everything – under the June 11th order, you should have had everything ready to produce months ago.

And under the denial of the motion for rehearing of the stay and your representation you would produce everything five days later, it should have all been produced by September 22nd of '08.

Here's October 6, 2008. You write Mr. Bean, Thank you for your letter of October the 3rd. While I had hoped to have the remaining production by the end of the week – again, I have no idea why that would be an issue, given my previous orders – you go on to talk about your trial with Judge Adams and so forth, which I know went away, but maybe this time it hadn't – I don't know when this was.

You know, and then you – you feel the need to add in this letter, You can rest assured that my client in this criminal case has received only that discovery allowed under the Federal Rules of Criminal Procedure. And it is a pittance of the discovery you have sought in the above-styled case.

I don't consider that snide remark appropriate, given where you were in this case. I don't understand

that. And now we're here – you know, another production – a [25] partial production was made after I issued the order to show cause.

And I guess you decided, Okay, I've finally maybe run out of chances here. Maybe I pushed him a little too far. Maybe no more Mr. Nice Guy, so I guess I better – I guess I better go ahead and comply.

And now we're here today. And that's the way I see the case. And so when – now we have an issue whether – my main concern all along has not been sanctions.

My main concern was that it was found by Judge Richardson, and affirmed by me, that the petitioners were entitled to a certain subset of documents. And I noticed in re-reading Judge Richardson's order – again, I thought he was very careful.

He found many of their requests overbroad. He tried to narrow them. I thought he was very careful to try to – to give appropriate discovery and – and, clearly – I know you had a legal argument that they weren't entitled to anything. That argument was rejected. It was rejected by him and it was rejected by me.

And the – and so then the scope of the production, I thought – I thought was – you know, I don't – I didn't know nearly as much about it as he did, but he seemed, to me, to be doing a very conscientious job of trying to narrow the issue, narrow the production.

[26] And, clearly, his order, in my mind, was neither erroneous or contrary to law. And so that's what should have been produced.

And so now I'm being told here today that even after all this lateness, and all this back-and-forth and so forth, that – I'm being told today that a full production has not been made.

Now, I have no idea – I don't have any slightest idea whether Mr. Bean is right or whether he's wrong. And I hear what you say. And you're saying you can't get blood out of a turnip and all that.

The problem I have, Mr. Lembcke, is I don't feel like your clients have much credibility right now, given the history of this case. And so that's where we are.

And that affects my thinking both about the scope of the production and what – and what links I should allow the petitioners to go to try to ensure that there has been complete production. And it also, frankly, applies to whatever sanctions are available to me.

And so, you know, I – I regret being here at 8:30 on a Monday morning to talk about sanctions involving two law firms and lawyers that I respect, but that's how I see it.

And – and so I want to give you – and I – you know, I know you could talk for an hour about this. But I

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* * *

[41] MR. BEAN: Thank you, Your Honor.

MR. LEMBCKE: Thank you.

COURT SECURITY OFFICER: All rise.

(The proceedings concluded at 9:25 a.m.)

[Certificate Omitted In Printing]



No. 08-1285

FILED

JUN 19 2009

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SUPREME COURT, U.S.

In The
Supreme Court of the United States

LAZAR S. FINKER, RAISSA M. FRENKEL,
STEVEN CHARLES KOEGLER, WILLIAM E. CHATTIN,
THEODOROS J. KAVALIEROS, and
AFRODITI KAVALIEROS,

Petitioners,

v.

GALINA WEBER,

Respondent.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit**

REPLY BRIEF

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REPLY BRIEF OF PETITIONERS

Respondent Galina Weber's ("Weber") Opposition to Petition for Writ of Certiorari raises new points warranting reply. Each new point raised by Weber is incorrect.

1. This Case Is Not Effectively Moot

Contrary to Weber's contention, this appeal is not moot. The discovery ordered in the Cyprus civil action does not cover or overlap the discovery ordered for use in the Swiss criminal case. Neither the time period nor claims in the Swiss criminal case overlap with those in the Cyprus civil case. The Eleventh Circuit correctly evaluated their relationship and found the discovery ordered was separate and not overlapping.

Although Weber simultaneously sought discovery for both her Cypriot and Swiss actions, the Magistrate Judge made careful rulings on the scope of discovery, separating out which discovery requests were appropriate for each action. The Magistrate Judge's careful analysis was adopted by the district court. The district court did not abuse its discretion.

Pet. App. 11, fn. 3.

Because Weber has not sought certiorari for review of the Eleventh Circuit opinion, this determination is not in dispute.

The discovery issues are ongoing in this case. Although the Magistrate Judge recently issued a Report and Recommendation concluding there should not be any more production ordered, the dispute is not concluded. The district court has granted additional time to file objections and appeal, and Weber's counsel has advised that she will appeal to that court. This Petition for Certiorari is not moot and the question presented is clearly defined and ripe for adjudication by this Court upon the law.

2. The Most Recent Amendment of 28 U.S.C. §1782(a) Merely Clarifies the Earlier Version of the Statute

Weber asserts that the Eleventh Circuit meticulously followed *Intel Corp. v. Advance Micro Devices, Inc.*, 542 U.S. 241 (2004), and that this Court did not determine the 1996 amendment to 28 U.S.C. §1782(a) was "a simple clarification." Opposition 18. Without explanation, Weber fails to acknowledge or explain this Court's determination:

In 1996, Congress amended §1782(a) to clarify that the statute covers "criminal investigations conducted before formal accusation."

Intel, 542 U.S. at 259.

Contrary to Weber's opposition, this Court in *Intel* concluded the 1996 enactment was a clarification of the 1964 revision that "judicial assistance would be available 'whether the foreign or international proceeding or investigation is of a criminal, civil,

administrative, or other nature. (Citation omitted.)’” *Id.* The Eleventh Circuit’s application of the “Last in Time” Rule to this case is incorrect because §1782’s last enactment is a clarification and does not preempt the U.S.-Switzerland MLAT (“Treaty”).

The Eleventh Circuit did not follow *Intel* with regard to the Treaty. If it had, its decision would necessarily be that the scope and extent of discovery should be determined according to the Federal Rules of Criminal Procedure. Contrary to the Eleventh Circuit decision and Weber’s Opposition, Petitioners invoked the Treaty because *Intel* directs district courts to consider several factors in ordering discovery, including whether or not the “§1782(a) request conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States.” *Intel*, 542 U.S. at 265.

In considering whether to order discovery and the scope and extent of production for use in the Swiss criminal case, the district court should have considered the enacted policy of the Treaty and concluded that criminal rules control compelled evidence gathering in criminal proceedings. The Treaty reflects the policies of both countries. The district court did not evaluate this factor and the Eleventh Circuit failed to require the district court to consider this *Intel* factor in deciding whether to order pretrial production and, if so, the scope of discovery for the Swiss criminal case. *See, e.g., In re Application of Kulzer*, 2009 W.L. 961229 *3-5 (N.D. Ind., April 8, 2009) (rejecting argument that the *Intel* factors need

not be considered and then concluding petitioner was attempting a "blatant end-run around foreign proof-gathering restrictions or other policies of a foreign country").

In addition, contrary to Weber's opposition and the Eleventh Circuit opinion, *Intel* considered and decided the meaning of the statute's language that the discovery order "may prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country of the international tribunal, for taking the testimony or statement or producing the document or thing . . . [or may be] the Federal Rules of Civil Procedure." This Court concluded the language is only a "mode of proof-taking instruction." *Intel*, 542 U.S. at 260, fn. 11. This limits the use of the Federal Rules of Civil Procedure to the procedures employed either for taking a deposition or requesting production, not for determining whether or not discovery is to be had or its scope. The Eleventh Circuit failed to follow this Court's directive in *Intel*.¹ In adopting this interpretation, *Intel* recognized this language was inserted into 28 U.S.C. §1782(a) as part of the 1964 enactment to alleviate problems encountered in the introduction of the evidence into foreign proceedings. Once again, the

¹ Petitioners' parenthetical following their citation of *Application of Sumar*, 123 F.R.D. 467 (S.D. N.Y. 1988), has an obvious error in the context of their brief and in the sentence itself. Pet. 15. It should read, in pertinent part, "(declining to apply the Federal Rules of *Criminal Procedure* . . .)".

Eleventh Circuit disregarded this Court's decision in *Intel* and decided the question in this appeal incorrectly.

◆

CONCLUSION

This case is a well situated, discrete case for the significant question raised in this Petition for Certiorari. The Eleventh Circuit's failure to follow *Intel* and the important jurisprudential issue warrants this Court exercising its supervisory power for an appropriate rule in 28 U.S.C. §1782(a) proceedings.

Respectfully submitted,

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